

(21,347.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 73.

MARIANO F. SENA, PLAINTIFF IN ERROR,

vs.

AMERICAN TURQUOISE COMPANY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW
MEXICO.

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1 UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judges of the Supreme Court of the Territory of New Mexico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court, before you, wherein Mariano F. Sena, was plaintiff in error, and The American Turquoise Company, was Defendant in error, a manifest error hath happened, to the great damage of said Plaintiff in error as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, sixty days from the date hereon, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States and the seal of the Supreme Court of the Territory of New Mexico, the fourth day of September A. D., 1908.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk Supreme Court of the Territory of N. M.

1a TERRITORY OF NEW MEXICO,
Supreme Court, ss:

I, the undersigned, clerk of the Supreme Court of the Territory of New Mexico, do hereby make return to the within writ of error by transmitting to the Supreme Court of the United States, a true copy of the record and proceedings in the cause therein mentioned, under my hand and the seal of the Supreme Court of the Territory of Mexico.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk Supreme Court of New Mexico.

Be it remembered, That heretofore, on to-wit: on the first day of September, A. D., 1908, there was filed in the office of the Clerk of the Supreme Court of the Territory of New Mexico, a transcript of record, in a certain cause, entitled, Mariano F. Sena, Plaintiff in

Error, vs. The American Turquoise Company, defendant in error, Numbered, 1167, which said transcript of record, was and is in words and figures following to wit:—

2 Be it remembered that heretofore, to-wit, on the 4th day of May, 1903, there was filed in the office of the Clerk of the District Court of the County of Santa Fe, Territory of New Mexico, a complaint in ejectment, which said complaint is in the words and figures following, to-wit:

TERRITORY OF NEW MEXICO,
County of Santa Fe:

In the District Court for said County, Sitting for the Trial of Causes Arising under the Laws of said Territory, A. D. 1903.

To the Honorable John R. McFie, Associate Justice of the Supreme Court of said Territory and Judge of said District Court:

Mariano F. Sena, resident of said county and Territory, plaintiff, complains of J. P. McNulty, also resident of said county and territory, and The American Turquoise Company, a corporation organized and doing business under the laws of the State of New Jersey, defendants, in a plea of ejectment, for that whereas, heretofore to-wit, on the fifteenth day of April, A. D. 1903, at the County of Santa Fe aforesaid, plaintiff was entitled to the possession of that certain piece or parcel of land, commonly known as the Jose de Leyba Grant, situate in the county aforesaid, being the same tract of land which was granted to Jose de Leyba by the governor and captain-general of New Mexico on May 25, 1728, which tract is bounded on the east by the San Marcos road, on the south by an arroyo called Cuesta del Oregano, on the west by lands formerly of Juan Garcia de las Rivas and now commonly known as the lands of the Pueblo Viejo de la Cienega, and on the north by lands formerly of Captain Sebastian de Vargas on the road that goes from Cerrillos to Pecos; and afterwards, to-wit, on the day and year aforesaid, at the county aforesaid, defendant entered into said premises, and particularly into certain alleged mining claims known as the "Muniz" containing ten and four one-hundredths acres; the "Castillian" containing ten and twenty one hundredths acres; and the "Gem Group, consisting of the Gem, Morning Star and Sky Blue", containing thirty and thirty-nine one-hundredths acres, all situated in Section 21, Township 15 north, Range 8 east, County and Territory aforesaid, and all being situate within the exterior boundaries of said grant of land, and unlawfully withheld, and thence hitherto hath unlawfully withheld and still doth unlawfully withhold from plaintiff the possession thereof, to his damage in the sum of \$100,000; therefore plaintiff brings suit and prays judgment of this Honorable Court for the recovery of the possession of the said premises and for the sum of \$100,000 his damages as aforesaid and for costs.

F. W. CLANCY,

H. S. CLANCY,

Attorneys for Plaintiff.

And afterwards, on the 14th day of May, 1903, there was filed in the office of said clerk, the answer and disclaimer of J. P. McNulty, which is in the words and figures following, to-wit:

In the District Court of the First Judicial District, Sitting in and for the County of Santa Fe, Territory of New Mexico.

No. 4527.

MARIANO F. SENA, Plaintiff,

vs.

J. P. McNULTY and the AMERICAN TURQUOISE COMPANY, Defendant.

Ejectment.

Now comes J. P. McNulty, one of the above named defendants, and for his separate answer to the complaint filed herein, says that he is not guilty of the detention and wrongs mentioned in said complaint. That he is not now and never has been in possession of the lands and premises therein mentioned except as an employee and agent of the American Turquoise Company for its benefit. That he disclaims any possession or claim thereto except as such employee and agent for the benefit of said American Turquoise Company, and therefore prays to be dismissed here with his costs herein.

J. P. McNULTY,

By EDWARD L. BARTLETT,

His Attorney, Santa Fe, N. M.

4 And afterwards, to-wit, on the 8th day of October, 1903, there was made and entered of record in said cause, the following order:

District Court, Sante Fe County.

MARIANO F. SENA

vs.

AMERICAN TURQUOISE COMPANY and J. P. McNULTY.

Now comes the said plaintiff by his attorneys and says to the court that he will not further prosecute his complaint against the said defendant, J. P. McNulty, but dismisses the same. It is therefore considered and adjudged by the court that the said J. P. McNulty, as to said complaint go hence without day, and recover of said plaintiff his costs in this behalf expended to be taxed.

JOHN R. McFIE,

Associate Justice, etc.

And afterwards, towit, on the 28th day of January, 1904, there was made and entered of record in said cause, an order changing the venue thereof, which said order is as follows:

In the District Court of the First Judicial District of the Territory of New Mexico, Sitting in and for the County of Santa Fe.

No. 4527.

M. F. SENA, Plaintiff,

vs.

J. P. McNULTY et al.

This cause coming on to be heard by the court upon the application of the plaintiff for a change of venue in said cause to some other district free from exception and the court having had the same under advisement and the plaintiff and defendant by their respective attorneys, F. W. Clancy for the plaintiff, and Edward L. Bartlett for the defendant, having agreed thereto, it is now ordered and adjudged by the court that the venue of said cause be changed to the county of San Miguel in the fourth judicial district, and that the clerk of this court transmit all the papers in said cause to the clerk of the fourth judicial district, together with certified copies of all record entries made herein. And it is so ordered.

JOHN R. McFIE,

*Associate Justice of the Supreme Court and
Judge of the First Judicial District.*

5 And afterwards, to-wit, on May 20, 1904, there was filed in the office of the clerk of the district court of San Miguel county, the amended answer of said defendant, which is in the words and figures following, to-wit:

In the District Court, San Miguel County.

MARIANO F. SENA, Plaintiff,

vs.

THE AMERICAN TURQUOISE COMPANY, Defendant.

Ejectment.

Amended Answer.

Now comes the American Turquoise Company, one of the defendants in the above entitled cause, and by leave of the court first had and obtained, for its amended answer to the complaint filed herein says:

1. It is not guilty of the detention and wrongs in said complaint charged against it, and that it is not now and was not in the unlawful possession of the lands described in said complaint on the 13th day of April, 1903, or at any other time. Nor was the said plaintiff at that time or at any other time entitled to the possession of the same or any part thereof.

2. And for another and further defense this defendant says that the plaintiff ought not to have or maintain this action, for that it is the owner and in possession of the land sued for in plaintiff's complaint, and it and those under whom it claims entered into the possession of the same lawfully and peaceably and have remained in the continuous, exclusive, actual, peaceable, hostile and open possession of the same continuously, under color of title and in good faith, and have made large lasting, valuable improvements thereon, and have paid taxes thereon, lawfully assessed against the same, down to the present time, working and operating the same, openly, exclusively and continuously for more than ten years before the filing of this suit, and after the right to commence and maintain the same has come fallen or accrued.

3. For another and further defense defendant says that the plaintiff ought not to have or maintain this action, for that as early as the year 1839, the predecessors in title, if any they had, of this plaintiff, abandoned all possession of said land, if they were in possession thereof, and never thereafter, by their agents or otherwise, asserted

6 any right to the possession or control over, or interest in the whole or any portion of the land included or intended to be included within the boundaries of said land grant mentioned in said complaint, or of the property or any portion thereof sued for. That from and after said time said land remained vacant, unoccupied and unclaimed, and none of the plaintiff's predecessors in title have ever been or are now in the possession of the whole or any portion of the land included within the boundaries of said land grant, set up in said complaint, nor any portion of the land sued for in this case. That under and by virtue of the treaty of Guadalupe Hidalgo between the United States and Mexico, of 1848, the territory within which the property sued for lies was ceded by the Republic of Mexico to the United States and jurisdiction thereover and possession thereof, under and by virtue of said treaty, was taken by the United States. That at said time said land was vacant, unclaimed, unoccupied and abandoned by the predecessors in title of this plaintiff, if any title, interest or right they had. That thereafter, the United States in the exercise of its jurisdiction and power passed an act entitled "An Act to establish the office of Surveyor General of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers therein, and for other purposes," approved July 22, 1854, under and by virtue of the eighth section of said act it was made the duty of the surveyor general under such instructions as may be given by the secretary of the interior to ascertain the origin, nature, character and extent of all claims to lands under the laws, usages and customs of Spain and Mexico; and for this purpose may issue notice, summon witnesses, administer oaths, and do and perform all necessary acts in the premises; he was also required to make full report upon all such claims originating before the cession of the Territory to the United States, under the treaty of Guadalupe Hidalgo of 1848, denoting the various grades of title with his decision as to the validity or invalidity of the same under the laws, usages and customs of the country before its cession to the United States. Said report was to be made according

to the form which might be prescribed by the secretary of the interior, which report was to be laid before congress for such action thereon as might be deemed just and proper, with a view of confirming *bona fide* grants and giving full effect to the treaty of 1848 between the United States and Mexico, and until the final action of congress on such claims all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donation granted by the previous provisions of this act.

By the ninth section of said act full power and authority was given the secretary of the interior to issue all needful rules and regulations for fully carrying into effect the provisions thereof.

That thereafter, to-wit, the secretary of the interior in the exercise of the lawful authority conferred upon him by the eighth section of said act of July 22, 1854, issued his instructions to the surveyor general of New Mexico, in and by which he directs the surveyor general as follows:

"Upon your arrival at Santa Fe you will make application to the governor of the Territory for such of the archives as relate to grants of land by the former authorities of the country. You will see that they are kept in a place of security from fire, or other accidents, and that access is allowed only to land owners who may find it necessary to refer to their title records, and such reference must be made under your eye, or that of a sworn employé of the government.

"You will proceed at once to arrange and classify the papers in the order of date, and have them properly and substantially bound. You will then have schedules (marked 1) of them made out in duplicate, and will prepare abstracts (No. 2) also in duplicate, of all the grants found in the records, showing the names of grantees, date, area, locality, by whom conceded, and under what authority.

* * * * *

"The knowledge and experience you will acquire in arranging the archives, collecting materials, and making out the documents called for by these instructions, will enable you to enter understandingly upon the work of receiving and examining the testimony which may be presented to you by land claimants, and prepare your report thereon, for the action of congress.

"In the first instance, you will provide yourself with a journal, consisting of substantially bound volume or volumes, which is to constitute a complete record of your official proceedings in regard to land titles; and with a suitable docket, for the entry therein of claims in the order of their presentation, and so arranged as to indicate at a glance a brief statement of each case, its number, name of original and present claimant, area, locality, from what authority derived, nature of title—whether complete or incomplete, and your decision thereon.

8 "Your first session will be held at Santa Fe, and your subsequent sessions at such places and periods as public convenience may suggest, of which you will give timely notice to the department.

"You will commence your session by giving public notice of the same, in a newspaper of the largest circulation in the English and

Spanish languages—will make known your readiness to receive notices and testimony in support of the land claims of individuals, derived from the change of government.

"You will require claimants in every case—and give public notice to that effect—to file a written notice setting forth the name of 'present claimant;' name of the 'original claimant;' nature of claim—whether inchoate or perfect; its date; from what authority the original title was derived, with a reference to the power and authority under which the granting officer may have acted; quantity claimed, locality, notice, and extent of conflicting claims, if any, with a reference to the documentary evidence and testimony relied upon to establish the claim, and to show a transfer of right from the 'original grantee' to 'present claimant.'

"You will also require of every claimant an authenticated plat of survey, if a survey has been executed, or other evidence, showing the precise location and extent of the tract claimed.

"This is indispensable, in order to avoid any doubt hereafter in reserving from sale, as contemplated by law, the particular tract or parcel of land for which a claim may be duly filed, or in communicating the title to the same hereafter, in the event of a final confirmation.

"The effect of this will be not only to save claimants from embarrassment and difficulties, inseparable from the presentation and adjudication of claims with indefinite limits, but will promote the welfare of the country generally, by furnishing the surveyor general with evidence of what is claimed as private property under the treaty and the act of July 22, 1854; thus enabling him to ascertain what is undisputed public land, and to proceed with the public surveys accordingly, without awaiting the final action of congress upon the subject.

"You will take care to guard the public against fraudulent or antedated claims, and will bring the title papers to the test of the genuine signatures, which you should collect of the granting officers, as well as to the test of the official registers or abstracts which may exist of the title issued by the granting officers.

In all cases, of course, the original title papers are to be produced, or loss accounted for; and where copies are presented, they must be authenticated; and your report should also state the precise character of the papers acted upon by you, whether originals or otherwise. Where a claim may be presented by a party as 'present claimant' in the right of another, you must be satisfied that the deraignment of title is complete; otherwise, the entry and your decision should be in favor of the 'legal representative' of the 'original grantee.'"

That thereafter, in compliance and obedience to said act of July 2, 1854, and the said letter of instructions of the secretary of the interior, of August 21, 1854, the surveyor general of New Mexico did issue and give notice to the inhabitants of New Mexico that—

"Claimants in every case will be required to file a written notice, setting forth the name of the 'present claimant,' name of the 'original claimant'—nature of claim, whether inchoate or perfect—its date—from what authority the original title was derived—with a

reference to the evidence of the power and authority under which the granting officer may have acted—quantity claimed, locality, notice and extent of conflicting claims, if any, with a reference to the documentary evidence and testimony relied upon to establish the claim, and to show transfer of right from the 'original grantee' to 'present claimant.'

"Every claimant will also be required to furnish an authenticated plat of survey, if a survey has been executed, or other evidence showing the precise locality and extent of tract claimed.

"To enable the surveyor general to execute the duty thus imposed upon him, by law, he has to request all those individuals who claimed lands in New Mexico before the treaty of 1848, to produce the evidence of such claims at this office at Santa Fe as soon as possible."

Which said notice was given on the 18th day of January, 1855, and report thereof duly made to the secretary of the interior. That although said act of July 22, 1854, and the instructions of the secretary of the interior remained in full force and effect and in full virtue and operation in said Territory until the 3rd day of March, 1891, yet, wholly ignoring and disregarding the provisions made for the protection and assertion of rights and preservation thereof, furnished notice to the United States and all others, plaintiff's predecessors in title, right or claim, failed, neglected and refused to in any manner and by any means avail themselves of the beneficent provisions provided for their protection, and particularly for the protection of the citizens of the United States, and in nowise gave notice to the surveyor general of the Territory of New Mexico, or to any other lawful authority or person that they or any of them claimed or intended to claim any right, title or interest in and to said land grant, or they had any interest therein, or asserted the same, or claimed the possession, or right to the possession thereof.

The said land remaining so vacant, abandoned and unoccupied, the United States in the year 1861, caused the public surveys to be extended over the same as vacant, unoccupied, and unclaimed land, and as public land belonging to the United States under the said treaty of Guadalupe Hidalgo; and although the said extension of said surveys over the same was made and approved in August, 1861, yet the said land was withheld from sale and entry under the laws of the United States until March 1, 1885, when the survey thereof was filed with the register of the United States land office at Santa Fe, New Mexico, from and after which date the lands were offered by the United States to its citizens as public lands and entries and filings thereon received and fully recognized by the United States. That during all this time, and for many years prior to the treaty of Guadalupe Hidalgo between the Republic of Mexico and the United States of date February 2, 1848, neither the predecessors of the plaintiff nor any one for them ever claimed, asserted or possessed said lands or any part thereof under a grant or otherwise, and in no manner gave any notice of said claim or right thereunder, either to the surveyor general of New Mexico or other officer or person,

that they or any of them claimed or intended to claim said lands or any portion thereof; nor did they or any of them, or this plaintiff, ever apply or request in any manner that said lands should be withdrawn from sale and settlement under the laws of the United States. That said land being offered by the United States on March 1, 1885, as public land and its citizens invited to explore, exploit and acquire the same under the land and mining laws thereof, and of the Territory of New Mexico, and being so vacant and resumption thereof having been exercised by the United States without claim or notice of any character that plaintiff's supposed
11 predecessors in title claimed the same or any part thereof by virtue of any Spanish or Mexican grant.

That on or about April 1, 1885, one M. K. Parmaly, one of the predecessors in title and possession of this defendant, entered upon and in the possession of the Castillian Quartz Lode mining claim, and duly gave notice thereof on the 22nd day of June, 1885, as required by law.

And thereafter, on or about the 31st day of January, 1890, Pedro Muniz and Faustian Muniz, two of the predecessors in title of this defendant, entered upon and took possession of the Muniz mine, and on or about the 1st day of February, 1890, gave notice thereof, as required by law;

That thereafter, on or about the 21st day of June, 1891, one J. M. Allan, one of the predecessors in title of this defendant, entered upon and took possession of the Morning Star Lode, and on or about the 24th day of August, 1891, gave notice thereof as required by law;

That thereafter, to-wit, on or about the 2nd day of June, 1891, one C. G. Storry, one of the predecessors in title of this defendant, entered upon and took possession of the Gem Lode, and on or about the 24th day of August, 1891, gave notice thereof as required by law;

That on or about the 2nd day of November, 1891, one C. G. Storry, one of the predecessors in title of this defendant, entered upon and took possession of the Sky Blue Turquoise Lode, and on or about the 13th day of March, 1892, gave notice thereof as required by law. All of the land being the property the possession of which is sued for by plaintiff, and all situate in Section 21, Township 15 north, Range 8 east, in the county of Santa Fe, Territory of New Mexico. That although the defendant's predecessors in title, and all those under whom it claims, and the defendant, commencing in the year 1885, and continuously down to the present time, made valuable improvements, developed said mines and mining claims, spent large sums of money thereon and in the development thereof, yet, disregarding the rights of the public and of the predecessors in title of this defendant, the said predecessors in title of this plaintiff, if any right or interest they had thereto, permitted, without protest, without objection, and without notice, said mines and property to be bought in open market, and permitted the same as early as the year 1892 to be mortgaged to secure the payment of a large

sum of money, to-wit, — dollars, which said mortgage was
12 duly recorded in Book "G," record of mortgages, at page
465, in the office of the probate clerk and ex-officio recorder
of Santa Fe county, New Mexico, on June 13, 1892, and yet, the predecessors in title of this plaintiff, if any claim they had, asserted no title or interest in, or right to the possession of, and gave no notice, although the acts and doings, the assertion and dealings of said property by the predecessors in title of this defendant, from the date of the original entry into possession of each and every of said mining claims, was well known and notorious and exclusively maintained, and in each and every instance made a matter of record in the district court of Santa Fe county, in the records of deeds, mortgages and mining locations, in the records of Santa Fe county, and in the records of the United States land office, in the City of Santa Fe, in the county of Santa Fe. That although the courts and offices of the Territory of New Mexico and of the United States were open to and invited, and justice and common fairness and honesty required that the plaintiff and his predecessors in title should and must assert seasonably their claim or claims to said lands, or the possession thereof, if any they had, as would appraise this defendant and its predecessors in title and possession.

That this defendant and its predecessors, in title and possession and through and under whom it claims have in all respects complied with the laws of the United States and the Territory of New Mexico relating to mining locations, and also the rules governing the location of mines in the Cerrillos Mining District of Santa Fe county, New Mexico, and have fully performed all work of development at large expense, and paid all dues and lawful demands, and made all necessary and proper proofs thereof to the proper officers of the United States.

That on the 3rd day of March, 1891, the Congress of the United States passed an act entitled "An Act to establish the Court of Private Land Claims and to provide for the settlement of private land claims in certain states and territories."

That by the provisions of the fifteenth section thereof, Section 8 of the act of Congress approved July 22, 1854, entitled "An Act to establish the office of Surveyor General of New Mexico, Kansas and Nebraska, to grant donations to actual settlers therein, and for other purposes," and all acts amendatory or in extension thereof,
13 or supplementary thereto, and all acts and parts of acts inconsistent with the provisions of this act were repealed.

That thereafter and while said land was open and offered by the United States for entry under the public land and mining laws of the United States, three of said mining claims, to-wit, the Morning Star Lode, the Gem Lode, and the Sky Blue Turquoise Lode were located and filed upon and possession thereof taken by the predecessors in title of this defendant and have been continuously held by them and this defendant down to the present time. That no notice, claim or act was taken or done by any one claiming any right, title or interest in and to the said land grant or the land covering the mining locations sued for in this case, so far as this de-

fendant or any one under whom it claims *were* advised or had any knowledge or information; but that the same was vacant, unoccupied and abandoned by the predecessors in title of this plaintiff, and during which time large sums of money were being expended for labor and material, improvements and development of said mining claims, without protest and without notice to the predecessors in title of this defendant that any such claim as is now asserted existed.

That in the year 1895, this plaintiff having discovered that said mining claims might be by some possibility included within the outboundaries of an old Spanish grant alleged to have been made in 1728 by Governor and Captain General Juan Domingo de Bustamante to one Jose de Leyba, he hunted up and procured from two of the supposed lineal descendants of the said Jose de Leyba for a nominal consideration general warranty deeds therefor, dated respectively August 16, 1895, and September 11, 1895. That up to said date no descendant or lineal descendant, heir or other person, having asserted claim or pretended to claim any right, title or interest in and to said lands, under and by virtue of said grant, and made no claim and asserted no right thereto, although the public surveys were extended over the same in 1861, was open for settlement and entry in 1885, and continued so to the present time, under claim and exercise of right by the United States and by the predecessors in title of this defendant, and this defendant. That by the act of extending the public surveys over the said land, by the filing of the plat of said survey in the United States land office, at the City of Santa Fe, New Mexico, and offering the same to entry under the public land laws of the United States, and the
14 continuation thereof to the present time, was an entry and a resumption thereof of said land by the United States, without protest and without objection by any one.

That on the 27th day of September, 1899, this plaintiff claiming said land under and by virtue of said deeds from the heirs and assigns of the original grantee, Jose de Leyba, filed his petition in the Court of Private Land Claims, at the city of Santa Fe, New Mexico, against the United States, seeking confirmation and recognition of said grant and the title thereto under the provisions of said act.

That afterwards, to-wit, on the 19th day of December, 1895, this plaintiff filed an amended petition in said Court of Private Land Claims against the United States, wherein there were joined as co-defendants with the United States among others, the defendants herein, J. P. McNulty and The American Turquoise Company; and wherein and by said amended petition this plaintiff alleged that said J. P. McNulty and The American Turquoise Company claimed adverse possession to real estate included in said Jose de Leyba grant otherwise than by the lease and permission of the petitioner therein, this plaintiff.

That thereafter on the 16th day of January, 1900, the defendants herein, J. P. McNulty and The American Turquoise Company, by their attorney, Edward L. Bartlett, filed their answer to said amended petition, wherein and whereby the right of this plaintiff to recover

was put at issue, alleging that they were and had been for many years in the actual, exclusive, open and notorious possession of five mining claims in the southern part of Santa Fe county, being the mining claims herein sued for and alleging that said land described in said grant, or nearly the whole thereof had been officially surveyed under the public laws of the United States, under the direction of the Surveyor General of New Mexico, and for more than twenty years last past had been recognized as public lands of the United States.

That thereafter, to-wit, on the 6th day of April, 1900, the United States filed its answer putting in issue the allegations contained in the plaintiff's petition and amended petition; asserting that the plaintiff was not entitled to confirmation or recognition, and further that said claim or petition not having been filed within two years from March 3, 1891, the claim mentioned in the petition of this plaintiff, filed in said court of private land claims, became
15 and was abandoned and forever barred, and the United States pleaded said limitation as a bar to the confirmation and recognition of said claim.

That thereafter, to-wit, on the 30th day of April, 1900, said cause being at issue, the same was heard by the court of private land claims, and after submission, the court on the 10th day of May, 1900, dismissed plaintiff's petition and declined to recognize or confirm the same.

That thereafter, on the 5th day of November, 1900, this plaintiff, by his attorney, prayed an appeal to the Supreme Court of the United States, which appeal was on the said day allowed by Wilbur F. Stone, Associate Justice of said court. Thereafter said appeal and the transcript of the record thereof was duly forwarded and filed in the office of the clerk of the Supreme Court of the United States on January 22, 1901. Thereafter, on said appeal, the Supreme Court of the United States did, on April 6, 1903, affirm the decree of the court of private land claims entered in said case on the 10th day of May, 1900. That thereafter, on the 24th day of June, 1903, the mandate of the Supreme Court, affirming the decree of the court of private land claims, was duly filed in the office of the clerk of said court.

That on June 1, 1903, upon petition of modification of judgment and for rehearing, filed by this plaintiff in said Supreme Court, it was ordered by said court that the decree of affirmance be amended by adding the following words: "So far as such decree orders that the petition be dismissed, but without prejudice to such further proceedings as petitioner may be advised to take." That on June 24, 1903, said order was filed in the office of the clerk of the court of private land claims, and on the same day an order was entered by the court of private land claims rejecting the claim and dismissing the petition in accordance with said mandate and said order of the Supreme Court; in all of which proceedings in said court of private land claims and in the Supreme Court of the United States the defendants herein, J. P. McNulty and The American Turquoise Company were represented by their counsel, Edward L. Bartlett, Esq.

That during all this time, and long prior to the treaty of Guadalupe Hidalgo, no lineal descendant, heir or other person, save these defendants ever had possession of any portion of the land included within the outboundaries of the land grant to Jose de Leyba of 1728,

16 but that if any possession whatever was had it was many years prior to the cession of this territory to the United States, and

was abandoned long prior thereto, and never resumed, asserted or claimed by any one of them, although they were residents of New Mexico, and not until this defendant and its predecessors in title, without knowledge, information and in good faith entered upon and developed what was supposed to be notoriously in this community, mines of great value and spent large sums of money in developing the same. Was there any attempt ever made or asserted by any one that they were within the boundaries of the Jose de Leyba grant of 1728, or that any claim was made or ever intended to be made against the United States or any one, that such claim existed or would be asserted or that it covered the land in that vicinity?

Therefore, this defendant says that by reason of the facts aforesaid, this plaintiff ought not to have or maintain his action against this defendant, and this it is ready to verify.

THE AMERICAN TURQUOISE CO.

By EDWARD L. BARTLETT,

MATT. G. REYNOLDS,

Its Attorneys.

And afterwards, on May 20, 1904, there was filed in the office of said clerk, the replications of plaintiff to the amended pleas of defendant, which replications are as follows, to-wit:

In the District Court, San Miguel County, May Term, 1904.

MARIANO F. SENA,

vs.

THE AMERICAN TURQUOISE COMPANY.

1. Now comes the plaintiff, and for a replication to the first of defendant's amended pleas which is in the nature of the general issue, and whereof it is to be assumed that defendant puts itself upon the country, says that he does the like.

2. Now comes the plaintiff, and as to the second amended plea of defendant which attempts to interpose the defense of the statute of limitations, says that the same is not sufficient to bar plaintiff from having and maintaining his action against defendant, because he says that defendant is a foreign corporation, and this he is ready to verify.

3. And for further replication to said second amended plea, plaintiff says that defendant is a foreign corporation incorporated under the laws of a state of the United States beyond the limits of this territory, and that it did not, as required by law, file any copy of its charter of incorporation or of its articles of incorporation, and of any general incorporation law under which it was incorporated, in the office of the secretary of this territory, nor

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in the office of the recorder of deeds of any county of this territory, until the 28th day of December, 1899, and this the plaintiff is ready to verify.

4. And for a further replication to said second amended plea, plaintiff says that defendant is a foreign corporation incorporated under the laws of a state of the United States beyond the limits of this territory, and that it did not, as required by statute, make and file with the secretary of the territory of New Mexico and in the office of the recorder of deeds of any county in this territory, a certificate signed by its president and secretary, duly acknowledged, designating the principal place where the business of such company should be carried on in this territory, and an authorized agent or agents residing at such principal place of business upon whom process might be served, until the 28th day of December, 1899, and prior to said 28th day of December, 1899, there was no officer or agent of defendant in this territory upon whom valid service of process could be made in suits against defendant and this the plaintiff is ready to verify.

5. And for further replication to said second amended plea plaintiff says that the pretended title therein set up and referred to by defendant is as to certain alleged mining claims and locations mentioned and referred to in the third amended plea, and is the same title which was on the 19th day of March, 1892, by Chauncy M. Story conveyed to The American Turquoise Company, which was a foreign corporation incorporated under the laws of the state of Illinois, a state of the United States beyond the limits of this territory, and that the said American Turquoise Company did not, as required by law, file any copy of its charter of incorporation or of its articles of incorporation, and of any general incorporation law under which it was incorporated, in the office of the secretary of this territory, nor in the office of the recorder of deeds of any county in this territory, until the 4th day of February, 1897, and this the plaintiff is ready to verify.

6. And for further replication to said second amended plea, plaintiff says that the pretended title therein set up and referred to by defendant is as to certain alleged mining claims and locations mentioned and referred to in the third amended plea, and is the same

title which on the 19th day of March, 1892, by Chauncy M. Story, conveyed to the American Turquoise Company, which was a foreign corporation incorporated under the laws of the state of Illinois, a state of the United States beyond the limits of this territory, and that the said American Turquoise Company did not, as required by statute, make and file with the secretary of the territory of New Mexico, and in the office of the recorder of deeds of any county in this territory, a certificate signed by its president and secretary, duly acknowledged, designating the principal place where the business of such company should be carried on in this territory, and an authorized agent or agents residing at such principal place of business, upon whom process might be served, until the 4th day of February, 1897, and prior to said 4th day of February, 1897, there was no officer or agent of said company in this territory

upon whom valid service of process could be made in suits against it, and this the plaintiff is ready to verify.

7. And for further replication to said second amended plea, plaintiff says that the pretended title therein set up and referred to by defendant is as to certain alleged mining claims and locations mentioned and referred to in the third amended plea, and is the same title which was, on the 11th day of June, 1897, by J. H. Sutherlin, as special master, conveyed to Howard Carter and William R. Alling, and that said pretended title remained in said Carter and Alling from said 11th day of June, 1897, until the 15th day of December, 1899, during the whole of which time the said Carter and Alling were continuously non-residents of, and absent from the territory of New Mexico, so that it was impossible to make valid service of process upon them or either of them in any suit against them, and this the plaintiff is ready to verify.

8. And for further replication to said second amended plea, plaintiff says that heretofore, to-wit on the 29th day of September, 1899, he began an action in the court of private land claims sitting in the district of New Mexico, and in said action, on the 19th day of December, 1899, he filed an amended petition by which the said defendant, the American Turquoise Company, was impleaded with others as a party defendant, as will appear by reference to said amended petition a copy of which is filed herewith and made a part hereof; that on the 16th day of January, 1900, an answer was filed in said former action by and on behalf of the defendant, the American Turquoise Company and another, a copy of said answer being

19 filed herewith and made a part hereof; that thereafter plaintiff prosecuted his said action in the court of private land claims and, upon appeal, in the Supreme Court of the United States diligently and without negligence, but failed therein from causes other than negligence in its prosecution, and that the present suit was commenced within six months thereafter; and this the plaintiff is ready to verify.

9. And for a further replication to said second amended plea, plaintiff says that defendant is not the owner of the land sued for by plaintiff nor of any portion thereof, and that defendant and those under whom it claims did not enter into the possession of the same lawfully or peaceably, nor have they remained in the continuous, exclusive, actual, peaceable, hostile, or open, possession of the same, continuously, under the color of title or in good faith, nor have they made large, lasting valuable improvements thereon, nor have they paid any taxes thereon lawfully assessed against the same, nor have they worked or operated the same openly, exclusively or continuously for more than ten years before the filing of this suit, and after the right to commence the same had come, fallen or accrued; and of this plaintiff puts himself upon the country.

10. And for a reply to a portion of the third amended plea, plaintiff says that the predecessors in title of plaintiff did not as early as the year 1839, or at any other time, abandon possession of said land, and that, after said time, they asserted their right to the possession and control over, and interest in the land included within

the boundaries of the land grant made to Joseph de Leyba in 1728, that being the property sued for; that from and after said time, said land did not remain vacant, unoccupied and unclaimed, and that plaintiff's predecessors in title have been in possession of the whole of the land included within the boundaries of said land grant, and that he is now in possession of a portion thereof; and that at the time the territory within which the property sued for lies, was ceded by the Republic of Mexico to the United States, the said land was vacant, unclaimed, unoccupied or abandoned by the predecessors in title of plaintiff; and of this plaintiff puts himself upon the country.

F. W. CLANCY,
H. S. CLANCY,
Attorneys for Plaintiff.

In the Court of Private Land Claims.

To the Honorable Court of Private Claims and the Chief Justice and Associate Justices thereof:

20 Your petitioner, Mariano F. Sena, resident of the City of Santa Fe, in the Territory of New Mexico, represents that he is the owner of that certain grant and tract of land lying and being situate in the county of Santa Fe in the Territory of New Mexico, known and called by the name of the Jose de Leyba Grant, and bounded and described as follows, to-wit:

On the east by the San Marcos road; on the south by an arroyo called Cuesta del Oregano; on the west by the lands of Juan Garcia de las Rivas, and on the north, by the lands of Captain Sebastian de Vargas.

Said tract of land was granted to Jose de Leyba by the then King of Spain by Governor and Captain General Juan Domingo de Bustamante, on the 25th day of May, A. D. 1728, and the granting papers for the same are in the form of an absolute and perfect grant; the original papers of which said grant are now on file in the office of the surveyor general of the territory of New Mexico, and are not in the power, possession or control of your petitioner, said original papers being identified as Archive No. 441.

Said land has never been officially surveyed and your petitioner does not know the area thereof, but he has filed with his original petition herein, a sketch map of the same showing approximately according to the best information which your petitioner can obtain, the shape of said land and its location as far as possible; but the exact area and location and shape cannot be stated or ascertained until a survey thereof shall be made.

Your petitioner claims said land by conveyances from the heirs and assigns of the original grantee.

Your petitioner states that since the filing of his original petition herein, he has been informed that the owners of Los Cerrillos grant, the same being a confirmed grant and numbered 78 on the docket of this court, J. P. McNulty, L. Bradford Prince, Thomas Whalen,

Samuel Bromagem, Thomas Moore, Jr., Diego Mares, Bernard Carroll, Otto Zeigler, Albert Geyer, and American Turquoise Company, claim adverse possession to real estate included within the said Jose de Leyba grant otherwise than by the lease or permission of your petitioner, and he therefore makes said parties and company parties defendant to this amended petition, and asks that proper process issue for service on them.

Said claim to said land has not been confirmed nor has it been considered or acted upon by congress or any other authorities
 21 constituted by law for the adjustment of land titles in the limits of said territory of New Mexico as acquired.

Your petitioner therefore prays that the validity of such title and claim and of said grant may be inquired into and decided by this Honorable Court and the same confirmed to your petitioner and the other heirs and assigns of said original grantee, and that he may have such other and further relief as the nature of the case requires and to your Honors may appear meet and proper.

F. W. CLANCY,

H. S. CLANCY,

Attorneys for Petitioners.

In the U. S. Court of Private Land Claims for the District of New Mexico.

General. No. 278.

MARIANO F. SENA

vs.

THE UNITED STATES, THE AMERICAN TURQUOISE COMPANY, J. P. McNULTY et al.

Now come the above named defendants, The American Turquoise Company and J. P. McNulty by Edward L. Bartlett, their attorney, and for their answer to the petition of the plaintiff filed herein deny that the said petitioner, Mariano F. Sena, is the owner of that certain land grant and tract lying and being situate in the county of Santa Fe in the Territory of New Mexico, known and called by the name of the "Jose de Leyba Grant" by the boundaries therein set out.

They deny that said tract of land was granted to Jose de Leyba by the then King of Spain by Governor and Captain General Juan Domingo de Bustamante on the 25th day of May, in the year A. D. 1728, or at any other time. And they deny that the granting papers for the same are in the form of an absolute and perfect grant.

And said defendants deny that said land has never been officially surveyed, but state the fact to be that a very large portion if not all of the said described land has been officially surveyed under the direction of the United States as public land of the United States
 22 under the direction of the surveyor general of New Mexico, and for twenty years last past has been recognized by the United States and in its land office as such public land.

And said defendants deny that they claim adverse possession to real estate included within the said Jose de Leyba grant, otherwise than by the lease or permission of said petitioner, but they state to the court that they are now and have been for many years last past in the actual, exclusive, open and notorious possession of five mining claims with a superficial area of about one hundred acres of land in the southern part of Santa Fe county just north of the "Los Cerrillos" confirmed grant referred to in plaintiff's petition; that they have continuously worked and operated said mining claims which were located under the mining laws of the United States and the Territory of New Mexico and the rules and regulations of the United States in the said territory and have the final receipt for a patent to one of said mining claims, under proceedings to obtain a patent therefor; that they have paid the taxes levied and assessed against the said property; and that they and their grantees have enjoyed the exclusive undisturbed and quiet possession of the same for more than ten years last past.

Said defendants therefore pray that the proof of the denials and allegations contained in this their answer may be inquired of by the court.

THE AMERICAN TURQUOISE COMPANY, and J. P. McNULTY,
By EDWARD L. BARTLETT,

Their Attorney.

And afterwards, on May 20, 1904, there was filed in the office of said clerk, plaintiff's demurrer to a portion of the third amended plea of defendant, which is as follows:

In the District Court, San Miguel County, May Term, 1904.

MARIANO F. SENA

VS.

THE AMERICAN TURQUOISE COMPANY.

Now comes plaintiff, and as to so much of the third amended plea of defendant, as is not denied in plaintiff's replication, says that the same is not sufficient in law to bar plaintiff from having and maintaining his action against defendant, and for causes of demurrer plaintiff specifies the following:

- 23 1. Said plea is bad for uncertainty.
2. Said plea is not single, but is bad for multiplicity.
3. Said plea sets up no matter of legal defense to an action of ejectment.
4. The matters in said plea set forth, if of any avail whatever, cannot be properly pleaded in an action at law, but are purely of equitable jurisdiction.
5. Said plea attempts to set up mere laches as a defense to an action at law.
6. Said plea sets forth a public statute of the United States of which the court would take judicial notice.

7. Said plea sets out at length the instructions of the secretary of the interior to the surveyor general of New Mexico, and a notice issued by said surveyor general pursuant to said instructions, which are immaterial and irrelevant to anything which can be litigated in this case, but which, if they could be admissible at all, are mere matters of evidence and not of pleading.

8. Said plea attempts to set up in bar of plaintiff's action, failure of his predecessors in title to initiate proceedings before the surveyor general under the act of congress of 1854, although that statute imposed no such duty upon claimants to lands under the laws of Spain and Mexico, their rights being preserved and protected without such action on their part, by the treaty of Guadalupe Hidalgo and by said act of 1854.

9. Said plea sets up as a bar, the action of the United States in surveying the land in question in 1861, and in opening it to public settlement in 1885, coupled with the alleged failure of plaintiff's predecessors in title to assert their claim to the land before the surveyor general or other officer, although said plea does not show that the owners of the grant had any knowledge or notice of the action of the government, and as a matter of law, such action by the government could have no effect on the proprietary rights of the owners, and no duty was imposed upon the owners to assert their rights before any officer, and the courts of the territory were closed against them.

10. Said plea sets up the location and possession of alleged mining claims by defendant and its predecessors in title, their development and improvement, their sales and mortgage, the recording of such locations, sales and mortgages, all without protest or objection by plaintiff's predecessors in title, and that the courts and officers

24 of the territory of New Mexico, and of the United States, were open to and invited, and justice and common fairness and honesty required that the plaintiff and his predecessors in title should and must assert their claim to said land so as to apprise defendant and its predecessors in title and possession, all of which so far as its sets up any matter of fact shows no bar to this action at law, and so far as it attempts to set up matter of law with regard to the courts and the duties of plaintiff and his predecessors in title, is bad because not correctly stating the law, and also because facts only should be pleaded.

11. Said plea sets up that defendant and its predecessors in title and possession have complied with the laws relating to mining locations and the rules governing the location of mines in the Cerrillos Mining District, and have fully performed all work of development at large expense and paid all dues and lawful demands and made proofs thereof to the proper officers of the United States, all of which contains no statement of fact whatever, but mere conclusions of law, and is immaterial and irrelevant to anything which can be litigated in this cause.

12. The passage of the Act of Congress establishing the court of private land claims, the repeal of the 8th section of the act of congress approved July 22, 1854, the subsequent location of three mining claims by defendant's predecessors in title, the fact that no

notice of such locations was taken by any owner of the grant, the further fact that plaintiff obtained deeds from defendants of the original grantee in 1895, all of which is set up in said plea, cannot remotely tend to create any bar to the present action.

13. The assertion in said plea that the act of extending the public surveys over the land, and the filing of the plat of said survey in the Santa Fe land office, and the offering the lands to entry under the public land laws of the United States, constituted an entry and a resumption of the land by the United States, is a mere conclusion of law and an incorrect one.

14. The various proceedings which took place in the court of private land claims and in the Supreme Court of the United States in the course of the prosecution by plaintiff of his claim to the land included within the grant to Joseph de Leyba, and which are recited in said plea, cannot possibly constitute any defense or bar to the present action.

15. The alleged fact set up in said plea that no claim was made to the said grant until defendant had in good faith developed mines of great value, even if true, constitutes no defense to an action at law for the recovery of real estate, and as stated in said plea, would not be sufficient to give defendant any protection even in a court of equity.

16. Said plea is in many other respects vague, uncertain, ambiguous, irrelevant, involved, complicated, confused, insufficient, argumentative, not conformable to the declaration, and incapable of trial, and is wholly superfluous and unnecessary.

Wherefore plaintiff prays judgment of said third amended plea, and as to whether he should be required to make any other or further reply thereto.

H. S. CLANCY,
F. W. CLANCY,
Attorneys for Plaintiff.

And afterwards, on May 20, 1904, there was filed in the office of the clerk of said court, a demurrer to parts of plaintiff's replication, which said demurrer is as follows, to-wit:

In the District Court, San Miguel County, May Term, 1904.

MARIANO F. SENA, Plaintiff,
vs.

THE AMERICAN TURQUOISE COMPANY, Defendants.

Ejectment.

Now comes the American Turquoise Company and to so much of such parts of plaintiff's replication as contained in paragraphs 2, 3, 4, 5, 6, 7 and 8 thereof, the same being replications to the second amended plea contained in the answer of the defendant, and demurs to them and each of them, and for separate grounds of demurrer to each of said pleas of replication assigns the following:

I.

First. That the second plea in said replication contained is not sufficient in law.

Second. That said plea does not contain sufficient facts which in law would preclude the defendant from having or maintaining said defense.

II.

26 First. That the third plea contained in said replication is not sufficient in law, and the facts therein stated constitute no lawful bar or impediment to the right of this defendant to have and maintain the defense contained in the second amended plea of its answer.

Second. That the facts set forth constitute in law no impediment or disability available in the defendant to have and maintain its said defenses contained in the second amended plea of its answer.

III.

First. That the fourth plea contained in said replication is not sufficient in law, and the facts therein stated constitute no lawful bar or impediment to the right of this defendant to have and maintain its defenses contained in the second amended plea of its answer.

Second. That the facts set forth constitute in law no lawful impediment or disability available in the defendant to have and maintain its said defenses contained in the second amended plea of its answer.

Third. That the facts set forth constitute no lawful right in this plaintiff to raise or attack directly or collaterally its legal capacity to have and maintain its defense as set forth in the second amended plea of its answer.

IV.

First. That the fifth plea contained in said replication is not sufficient in law, and the facts therein stated constitute no lawful bar or impediment to the right of this defendant to have and maintain its defenses contained in the second amended plea of its answer.

Second. That the facts set forth constitute in law no lawful impediment or disability available in the defendant to have and maintain its said defenses contained in the second amended plea of its answer.

Third. That the facts set forth constitute no lawful right in this plaintiff to raise or attack, directly or collaterally its legal capacity to have and maintain its defenses as set forth in the second amended plea of its answer.

V.

27 First. That the sixth plea contained in said replication is not sufficient in law, and the facts therein stated constitute no lawful bar or impediment to the right of this defendant to have and maintain its defenses contained in the second amended plea of its answer.

Second. That the facts set forth constitute in law no lawful impediment or disability available in the defendant to have and maintain its said defenses contained in the second amended plea of its answer.

Third. That the facts set forth constitute no lawful right in this plaintiff to raise or attack, directly or collaterally, its legal capacity to have and maintain its defenses as set forth in the second amended plea of its answer.

Fourth. That the facts stated in the sixth plea of said replication constitute no lawful bar, impediment or disability on the part of this defendant to have and maintain the defenses contained in the second amended plea of its answer in this, that the facts set forth in said replication would not be availed of against this defendant except by the Territory in a proper proceeding upon its behalf.

VI.

First. That the seventh plea contained in said replication is not sufficient in law, and the facts therein stated constitute no lawful bar or impediment to the right of this defendant to have and maintain its defenses contained in the second amended plea of its answer.

Second. That the facts set forth constitute in law no lawful impediment or disability available in the defendant to have and maintain its said defenses contained in the second amended plea of its answer.

Third. That the facts set forth constitute no lawful right in this plaintiff to raise or attack, directly or collaterally, its legal capacity to have and maintain its defenses as set forth in the second amended plea of its answer.

Fourth. That the facts stated in the seventh plea of said replication constitute no lawful bar, impediment or disability on the part of this defendant to have and maintain the defenses contained in the second amended plea of its answer, in this, that the facts set forth in said replication would not be availed of against this defendant, except by the Territory in a proper proceeding.

VII.

First. That the eighth plea in said replication contained is not sufficient in law in this, to-wit:

28 1. That the facts therein stated constitute no disability or impediment on the part of this plaintiff to the proper prosecution of whatever rights this plaintiff may have to recover the possession of the property properly sued for in the proper tribunals of the Territory.

2. That the same does not fully set forth the facts and proceedings had in the court of private land claims, so as to constitute any lawful excuse for delay in prosecuting his said suit for the possession of said property in the proper courts of the Territory.

3. That the facts therein stated are incomplete and insufficient to constitute an interruption of the running of the bar of the statute of limitation against him and those under whom it claims.

4. That the facts therein stated does not show: (a) that suit was

ever instituted by plaintiff against this defendant for the recovery of said property, and that the same was dismissed without judgment upon the merits, and suit reinstituted within six months thereafter, so as to constitute a bar of the statute set up by defendant in its second plea contained in its amended answer; (b) that the facts therein stated do not show that said action in said court of private land claims was for a recovery of the possession of said property, or was of the same nature and character, or between the same parties.

Wherefore, defendant prays judgment as hereinbefore prayed in its amended answer filed herein.

THE AMERICAN TURQUOISE
COMPANY,
By EDWARD L. BARTLETT,
MATT. G. REYNOLDS,
Its Attorneys.

And afterwards, to-wit, on the 30th day of May, 1905, there was made and entered of record in said cause, the following order:

In the District Court, Fourth Judicial District, County of San Miguel, Territory of New Mexico.

No. 5834.

MARIANO F. SENA
vs.
THE AMERICAN TURQUOISE Co.

Ejectment.

This cause having heretofore come on to be heard upon the demurrer to so much of the third amended paragraph of the defendant's answer as is not denied by the plaintiff's replication, and the court having heard Frank W. Clancy, Esq., attorney for the plaintiff, and Stephen B. Davis, Esq., attorney for the defendant, and being fully advised in the premises, does hereby overrule the said demurrer, to which ruling of the court the plaintiff by his attorney excepts; and, at the same time the demurrer filed by the defendant to parts of the replication filed by the plaintiff having come on to be heard, and the court having heard Stephen B. Davis, Jr., Esq., attorney for the defendant, and Frank W. Clancy, Esq., attorney for the plaintiff, and being fully advised in the premises, does hereby sustain the said demurrer, to which ruling of the court the plaintiff by his attorney duly excepts.

Las Vegas, N. M., May 26th, 1905.

WILLIAM J. MILLS,
Chief Justice, etc.

And afterwards, to-wit, on August 5, 1905, there was filed in the office of said clerk, the replication of plaintiff to the third amended plea of defendant, which is as follows, to-wit:

In the District Court, County of San Miguel, Territory of New Mexico.

MARIANO F. SENA

vs.

THE AMERICAN TURQUOISE COMPANY.

Now comes the plaintiff by his attorneys, and by way of replication to so much of defendant's third amended plea as he has not heretofore replied to, admits that Congress of the United States passed an Act, approved July 22, 18-4, such as is described and set out in said plea, and that the secretary of the interior in the exercise of authority conferred upon him by said act, issued instructions to the surveyor general of New Mexico which were, in part, as set forth in said plea, and that thereafter the surveyor general of New Mexico issued and gave notice to the inhabitants of New Mexico, as set forth in said plea, and that said act of congress and said instructions remained in force until March 3, 1891; but plaintiff denies that said act of congress, instructions and notice imposed upon him or his predecessors in title any active duty with regard to the assertion of

his or their claims to the land in question before the office of
30 said surveyor general, and he avers that, on the contrary, under said act of congress and instructions, it was the positive active duty of said surveyor general to ascertain the origin, nature character and extent of the claim for land under the said grant to Joseph de Leyba made in the year 1728, and to make a full report thereon, with his decision as to the validity or invalidity of the same, and that if he had performed his duty in the premises, he would have found full and complete documentary evidence in the Spanish archives relating to grants of land by the former authorities of the country as to the origin, nature, character and extent of the said grant. Plaintiff denies that the United States in the year 1861 caused the public surveys to be extended over the said grant as vacant, unoccupied and unclaimed land, and as public land belonging to the United States, although he admits that the United States did cause the said land to be surveyed under the laws relating to public surveys; and he admits that the said survey was withheld, as stated in said plea from the local United States land office at Santa Fe for nearly 24 years after the survey was made, and he states the fact to be that said survey was so withheld for nearly a quarter of a century because it was a well known and notorious fact that the said land and other lands which were surveyed at the same time, were claimed under the said Leyba grant and other grants from the Spanish government. Plaintiff denies that during all this time, and for any time prior to the treaty of Guadalupe Hidalgo, neither his predecessors nor any one of them, claimed, asserted or possessed said lands, and denies that they in no manner gave any notice of said claim or right thereunder; and he denies that on or about April 1, 1885, one M. K. Parmaly entered upon or in the possession of the Castilian Quartz Lode mining claim or gave any notice thereof on June 22, 1885, or at any other time; and he denies that on or about the 21st day of

January, 1890, Pedro Muniz and Faustin Muniz entered upon and took possession of the Muniz Mine, or gave any notice thereof; and he denies that on or about the 21st day of June, 1891, one J. M. Allen entered upon or took possession of the Morning Star Lode, or gave any notice thereof; and he denies that on or about the 2nd day of June, 1891, C. G. Storry entered upon or took possession of the Gem Lode, or gave any notice thereof; and he denies that on

31 or about the 2d day of November, 1891, one C. G. Storry entered upon or took possession of the Sky-Blue Turquoise Lode, or ever gave any notice thereof; and plaintiff denies that defendant's predecessors in title or the defendant, commencing in the year 1885 and continuously down to the present time, have made valuable improvements or developed said mines and mining claims, or spent large sums of money thereon, or in the development thereof, and he denies that he or his predecessors in title have permitted said mines or property to be bought in open market or have permitted the same to be mortgaged, as in said plea alleged; and he denies that the courts or offices of the Territory of New Mexico or of the United States, were open to or invited, or that justice or common fairness or honesty required, that he or his predecessors in title should or must assert their claim or claims to said lands. Plaintiff further denies that defendant and its predecessors in title or possession, have in any respect complied with the laws of the United States or the Territory of New Mexico, relating to mining locations or the rules governing the locations of mines in the Cerrillos Mining District of Santa Fe county, New Mexico, or that they have fully performed any work or development at large expense, or paid any due or lawful demands or made any necessary or proper proofs thereof to the officers of the United States.

Plaintiff admits that the Congress of the United States on March 3, 1891, passed an act establishing the court of private land claims, as pleaded in said plea, but he denies that the mining claim called the Morning Star Lode, the Gem Lode, and the Sky-Blue Turquoise Lode, were located or filed upon or possession thereof taken, by the predecessors in title of defendant, and he denies that the said land grant or the land covering the said mining locations, was vacant, unoccupied or abandoned, and he denies that large sums of money were being expended for labor and material, improvements and development of said mining claims.

Plaintiff admits that in the year 1895, he obtained from two lineal descendants of the said Jose de Leyba, deeds for their interests in the said grant, but he denies that said deeds were obtained for a nominal consideration, as in said plea alleged; and he denies that up to that time no descendants, heir, or other person had asserted claim or had pretended to claim any right, title or interest under said grant, or had made no claim or asserted no right thereto; and he denies

32 that by the act of congress extending the public surveys over said land or by the filing of the plat of such survey in the United States land office at Santa Fe, and offering the same to entry under the public land laws, there was any entry or a resumption of said land by the United States.

Plaintiff admits that he filed a *petition*, and afterwards an amended petition in the court of private land claims, as in said plea set forth; and he admits that J. P. McNulty and the American Turquoise Company filed their answer to said amended petition, as in said plea set forth, and that the United States also filed its answer as in said plea set forth; and that said court of private land claims dismissed plaintiff's petition, and that he, the said plaintiff prayed an appeal to the Supreme Court of the United States, which was allowed, and that the said Supreme Court of the United States affirmed the decree of the court of private claims and afterwards modified the decree of affirmance, as in said plea set forth.

Plaintiff denies that during all this time, long prior to the treaty of Guadalupe Hildago, no descendant, heir or other person save defendant, had possession of any portion of the land included within the land grant of Jose de Leyba in 1728, and he denies that such possession was abandoned prior to the cession of this territory to the United States.

All of which the said plaintiff is ready to verify. Wherefore he prays judgment against the said defendant as in and by his declaration herein he has already prayed.

H. S. CLANCY,
F. W. CLANCY,
Attorneys for Plaintiff.

And afterwards, to-wit, on September 2, 1905, said cause coming on for trial, the following proceedings were had, to-wit:

MARIANO F. SENA
vs.
AMERICAN TURQUOISE COMPANY.

Now comes the plaintiff by his attorneys, F. W. Clancy and H. S. Clancy, and the defendant comes by its attorneys, M. G. Reynolds and S. B. Davis, Jr., and issue having been joined between the parties, thereupon comes a jury, which being duly sworn to try the issue joined between the parties, after hearing the evidence and the
33 arguments of counsel, by direction of the court returns a verdict of not guilty; whereupon the plaintiff gives notice of a motion for a new trial.

And afterwards, on September 4, 1905, there was filed in the office of said clerk, plaintiff's motion for a new trial of said cause, which motion is as follows, to-wit:

In the District Court, San Miguel County, Territory of New Mexico.

No. 5834.

MARIANO F. SENA

vs.

AMERICAN TURQUOISE COMPANY.

Now comes plaintiff by his attorneys and moves the court to set aside the verdict heretofore rendered herein, and to order a new trial of this cause for the following reasons:

1. The court erred in admitting improper evidence on behalf of defendant.

2. The court erred in excluding proper evidence on behalf of plaintiff.

3. The court erred in directing a verdict for defendant.

4. The court erred in holding that the title of plaintiff was imperfect.

5. The court erred in holding that there was any uncertainty as to the southern boundary of the grant to which plaintiff has title.

6. The court erred in holding that there was any uncertainty as to the western boundary of the grant to which plaintiff has title.

7. The verdict is contrary to the evidence.

8. The verdict is contrary to the law.

9. The verdict is contrary to the weight of the evidence.

10. The court erred in refusing to instruct the jury to find in favor of the plaintiff.

11. There is no evidence to support the verdict.

12. The court erred in holding that plaintiff could not recover unless he had a perfect title to the land in controversy.

13. The land in controversy, included in the alleged mining claims of defendant, was, by the uncontradicted evidence, shown to be within the boundaries of the grant to Jose de Leyba.

F. W. CLANCY,

H. S. CLANCY,

Attorneys for Plaintiff.

34 And afterwards, on September 4, 1905, there was filed in the office of said clerk, plaintiff's motion in arrest of judgment, which motion is as follows, to-wit:

In the District Court of the Fourth Judicial District of the Territory of New Mexico, Sitting Within and for the County of San Miguel.

No. 5834.

MARIANO F. SENA
VS.
AMERICAN TURQUOISE COMPANY.

Ejectment.

Now comes the plaintiff by his attorneys and moves the court to arrest the judgment on the verdict heretofore rendered herein, for the following reasons:

1. The court erred in sustaining the demurrer to the replication numbered 2, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

2. The court erred in sustaining the demurrer to the replication numbered 3, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

3. The court erred in sustaining the demurrer to the replication numbered 4, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

4. The court erred in sustaining the demurrer to the replication numbered 5, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

5. The court erred in sustaining the demurrer to the replication numbered 6, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

6. The court erred in sustaining the demurrer to the replication numbered 7, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

7. The court erred in sustaining the demurrer to the replication numbered 8, to the second amended plea, thus forcing plaintiff to go to trial without the benefit of what is set up in said replication.

35 8. The issue tendered by the replication numbered 10, to part of the third amended plea, was an immaterial issue.

9. The court erred in overruling plaintiff's demurrer to portions of the third amended plea, thus forcing plaintiff to reply to those portions.

10. The issue tendered by the replication to the portions of the third amended plea, previously demurred to, was an immaterial issue.

F. W. CLANCY,
H. S. CLANCY,
Attorneys for Plaintiff

And afterwards, on September 4, 1905, there was made and entered of record, a final judgment in said cause, in the words and figures following, to-wit:

In the District Court of the Fourth Judicial District, Sitting Within
and for the County of San Miguel.

No. 5834.

MARIANO F. SENA

vs.

AMERICAN TURQUOISE COMPANY.

Ejectment.

Now comes the plaintiff by his attorneys, F. W. Clancy and H. S. Clancy, and moves the court for reasons set forth in his motion on file to set aside the verdict of the jury heretofore rendered herein and grant him a new trial of this cause, and said motion being submitted to the court, is denied; It is therefore ordered by the court that said motion be and the same hereby is denied. Whereupon defendant by his attorneys moves the court to arrest the judgment upon the verdict heretofore rendered herein for reasons set forth in his motion on file, and said motion being submitted to the court, is denied; It is therefore ordered by the court that said motion be and the same hereby is denied. Whereupon it is considered and adjudged by the court that the said defendant American Turquoise Company go hence without day and recover of the plaintiff Mariano F. Sena its costs in this behalf expended to be taxed and that it have execution therefor.

W. J. MILLS,
Chief Justice, Etc.

Sept. 4, 1905.

And afterwards, on the 30th day of August, 1906, there was filed
in the office of said clerk, plaintiff's bill of exceptions in said
36 cause, which is in the words and figures following, to-wit:

In the District Court for the Fourth Judicial District, Territory of
New Mexico, County of San Miguel.

No. —.

MARIANO F. SENA

vs.

AMERICAN TURQUOISE COMPANY.

Ejectment.

Be it remembered that on the trial of the above entitled cause beginning on the 28th day of August, 1905, before the Honorable William J. Mills, Judge of said District Court, and a jury, the plaintiff being represented by Messrs. Frank W. Clancy and Harry S. Clancy, and the defendant by Messrs. Matt G. Reynolds and Stephen

B. Davis, Jr., the following proceedings were had and evidence given, as follows:

Plaintiff's Case.

Mr. F. W. CLANCY: I will first offer in evidence, Archive No. 441, of the surveyor general's office of New Mexico, and present a translation of the document.

(The same was marked for identification Plaintiff's Exhibit A.)

Mr. REYNOLDS: I desire to object to the admission of this document in evidence for the reason it shows on its face that it was a grant for a small tract of land—4.41-100 acres, lying within the out-boundaries as given in a grant, and therefore, if the total area contained in the grant were given to the parties, it would not cover as much property as is contained in these mining claims, which amounts to thirty-one acres, and that the alleged act of juridical possession does not contain a description of the boundaries of the grant; does not recite them, and that therefore the land they were put in possession of under the juridical act was not given in the act itself, and an act of possession to be an act of juridical possession must describe the property by boundaries, either by natural objects or by such a name as will enable the party with the act of juridical possession to go and identify the property without further act or information; and secondly, it does not appear that this act of juridical possession, the grant, or the petition subsequent to the
37 alleged act of possession was ever approved by any higher authority. It is contended by the defendant that in order for this title to be a perfect title, that it must be approved by some other authority than the granting officer, and that it does not appear in these papers, and it should appear on the papers, and unless it can be shown otherwise, that it received the approval of some higher authority than the Provincial officer making the grant, that it is not a perfect grant.

Mr. F. W. CLANCY: In view of part of the objection, I amend the offer so as to offer in evidence the original archive in Spanish as well as the translation, and the two papers can be marked Plaintiff's Exhibit A. The reason I do that is on account of the question of the exact meaning of the Spanish words "as to the quantity of land."

Mr. REYNOLDS: I desire to offer the further objection as suggested by Mr. Davis, that there is no proof of the authenticity of the genuineness of the signature of the officer, and particularly his power to make a grant, of this character, and that there is no proof he was the governor at the time, or that he had any authority to make the grant. I make that additional objection, to the other, suggested by counsel, so as to preserve the record.

Mr. F. W. CLANCY: That is purely a matter of law—it is for the court to say.

Mr. REYNOLDS: It might be suggested now, in an action of this character between private parties in the local courts, whether the court will take judicial notice of the laws of Spain and Mexico, and

it will be a matter that the court will have to pass upon. In passing upon the authority of the governor to make this character of grant, it is true the supreme court of the United States and the court of private land claims have held especially in actions with the government on confirmations of claims, that the laws of the former government under which the grant was made became for the purposes of the case domestic laws, of which the court will take judicial notice, but whether or not in an action of this character the court will take judicial notice of them, is another question, and therefore I make the objection.

Mr. F. W. CLANCY: The decisions of the supreme court of the United States on that point are that the courts take the same judicial notice of the laws of the former government when they arise in any form of action, public or private, civil or criminal, that they would of our own laws.

38 The COURT: Whether this man was the governor or captain general I suppose you can prove that.

Mr. CLANCY: There is nobody now here who saw him when he was acting in that capacity.

I desire to have the record show that this archive No. 441, is of one of the original archives found among the Spanish papers at the time of the organization of the office of surveyor general. That, I understood Mr. Reynolds to say—is the fact.

Mr. REYNOLDS: I am not admitting anything so far as the record is concerned. There is no doubt about the fact that archive No. 441 was found by the surveyor general in the archives, to be perfectly frank to counsel and court, about it, in the year 1855. The question of power to make it and of the officer is another question.

Mr. Reynolds: I suggest to the court that in the translation of the document there is not much variance, except as to the description of the property, and the translation we propose to submit to the court is a translation made by Mr. William M. Tipton, who gave it a careful examination and a very careful translation. As far as the court is concerned, when the original document is offered in evidence, if the court is not satisfied with the translation, it may have one made to suit the court. I do not know how that can be done.

The COURT: I will admit the original Spanish document, subject to the exception of the defendant.

Mr. CLANCY: I submit my translation for the consideration of the court, and if counsel desires to submit another translation, he may do so.

Mr. REYNOLDS: Very well, we will take it up when we come to it.

The original Spanish document was here marked Plaintiff's Exhibit A, and the translation was read to the court and jury as follows:

City of Santa Fe, May 29, 1728, before the governor and captain general of this kingdom, there was presented this petition with its contents:

Joseph de Leyba, resident of the city of Santa Fe, appears before Your Excellency in due legal form, and state that in accordance with the royal ordinances of His Royal Majesty, I record a piece

of lands and woods, uncultivated and unsettled, which includes a half a fanega of corn-planting land, a little more or less, which is bounded on the east by the San Marcos road; on the south by an arroyo called Cuesta del Oregano; on the west by land of Juan García de las Rivas, and on the north by lands of Captain Sebastian de Vargas.

Therefore, I ask and pray, in all humility that Your Excellency be pleased to make me in the name of His Majesty, a grant for the said piece of land, for myself and my children, heirs and successors, and that the act of royal possession be executed to me whereby I will receive benefit and favor as well as justice which I seek. And I swear in due form that this my petition is not made in malice and as it may be necessary, etc.

JOSEPH DE LEYBA.

Grant.

This petition was presented by the petitioner to his excellency, the governor and captain general of this province, and being examined by His Excellency, he treated the same as before him, and in consideration of the prayer of the party His Excellency directed the chief alcalde of the city of Santa Fe to proceed to the spot referred to by the party, and inspect the land he applies for with citation to the adjoining settlers; and there being no prejudice resulting to any third party having a better right, I do make, and in the name of His Majesty (God preserve him) the grant for the land the petitioner prays for, with the condition that he settle the same within the term prescribed by the royal ordinances, into the royal and personal possession of which land said chief alcalde will place the party, and will place the act of possession at the close hereof.

Thus His Excellency aforesaid decreed, commanded and signed before me the present secretary of state and war. To which I certify.

BUSTAMANTE.

By command of his excellency, the gov. and capt. gen'l.

ANTONIO DE GIVUSAYA,

Secretary of State and War.

Act of Possession.

At the city of Santa Fe, on the 25th day of the month of May, in the year one thousand seven hundred and twenty-eight, before me, Capt. Diego Arias de Quiros, chief alcalde and war capt. of the said city, acting as special commissioner with the undersigned my attending witnesses; in execution of the above decree made by His

Excellency Juan Domingo de Bustamante, gov. and capt. gen'l, I proceeded to give the possession prayed for by Jose de Leyba in his petition. I arrived at the place and applied for by the petitioner, taking with me Juan Manuel Chirinos and Capt. Sebastian de Vargas and having inspected the land and woods prayed for by the said petitioner, I took him by the hand in the

presence of the parties mentioned, performing the customary ceremonies, and he plucking up grass, casting stones, and shouting aloud in sign of ownership, I placed him in royal possession, in the name of His Majesty (God preserve him); so that in his name and royal word, he, the party aforesaid and his children and heirs may enjoy the same. In testimony whereof I sign this as special justice with the undersigned my attending witnesses for lack of a public or royal notary, there being none in this province, and on this common paper as there is no stamped paper in this section. I certify.

DIEGO ARIAS DE QUIROS,
Special Justice.

JUAN MANUEL CHIRINOS.
JUAN JOSEPH LOBATO.

Mr. CLANCY: I now offer in evidence Archive No. 572, from the surveyor general's office, which is a deed from Jose Castellanos to Miguel Garcia de las Rivas, dated August 12th, 1701, of which we present a copy and translation, (handing same to court).

The deed and translation were marked for identification Plaintiff's Exhibit B.

Mr. F. W. CLANCY: I was offering it in this order because it chronologically came that way,—it is for the purpose of establishing the location of the lands called for in the petition for this grant as the western boundary.

Q. State what is was

Mr. REYNOLDS: We object to it for the reason it is not the proper way to show the location of the western boundary of this grant, and secondly, as appears, it has no reference to it one way or the other—the location of this grant is an important matter of controversy, and it is an improper way of proving the location or ancient boundaries of a land grant by a deed of this character, made long prior to the making of this grant.

The COURT: What is the date of the deed?

Mr. CLANCY: 1701.

Mr. DAVIS: With the permission of the court, I desire to make the additional objection, that the instrument the gentlemen
41 seek to introduce, the effect of it is the declaration of the grantor in that instrument as to the boundary of the land in controversy here, and that there is no proof, either that the person who made that declaration or the grantor in the deed was at the time the owner of adjacent land, nor is there any proof that he was at that time in possession of the adjacent land. As I understand the rule which allows hearsay for the purpose of proving boundaries, it is that statements made by persons now dead, are admissible in proving the boundaries, provided the persons making the statements were either the owner of the land about which they state, or were in the actual possession of it, or rather, they must be both the owner and in possession to make their full declarations admissible.

Mr. F. W. CLANCY: That rule does not have any application to deeds made 204 years ago.

Objections overruled.

Exception reserved by defendant's counsel.

The deed was here marked Plaintiff's Exhibit B, and the translation read to the court and jury, as follows:

(Translation.)

Royal sale of La Cienega in favor of Miguel Garcia de la Riva, 1701.

At the villa of Santa Fe on the twelfth day of the month of August of the year one thousand seven hundred and one, before me Joseph Rodriguez, alcalde ordinario of the second vote of this said villa, there being no public or royal notary (escrivano) in this kingdom, nor within a radius of more than two hundred and seventy leagues, acting as juez receptor with two attending witnesses, appeared Joseph Castellanos, resident of this said city, and said that he was giving and gave in royal sale the sitio of the old pueblo of the Zienega, which he bought from the royal ensign Domingo de la Barreda, to whom it had been sold by the same person in whose favor this deed is executed, who is Miguel Garzia de la Riba, with the grant which the General Don Diego de Vargas made to Bernebe Jorje in name of His Majesty, of whom he had it by royal sale, the said Miguel Garzia, for the price of two hundred dollars of the money of the country which is to be paid by the month of January of the coming year one thousand seven hundred and two and renounces the laws of non numerata pecunia and those of the Duobus res de Vendi, and the autentica pre fide iuroribus, so that as his own property, the said Sitio de la Cienega, he can exchange and transfer it or use the same at his pleasure, and empowering the courts of His Majesty with all rigor of law to compel him to comply with the provisions contained in this document, and if the said Jose Castellanos should at any time bring suit, he shall not be heard in court or out of it, and as a guaranty he pledges his person and real and personal property. To have and to hold he so executed and signed the same together with myself and my assisting witnesses who were Joseph Antonio Romero and Domingo de la Barreda, and at the request of the parties I delivered the original of this, and left a copy thereof in my possession written on ordinary blank paper, there being no sealed paper in these parts.

JOSEPH CASTELLANOS.

Assisting witness:

DOMINGO DE LA BARREDA.

Assisting witness:

JOSEPH ANTONIO ROMERO.

Before me as special judge:

JOSEPH RODRIGUEZ.

This copy agrees with its original which I, Joseph Rodriugez, alcalde ordinario of the second vote of this city, have copied to the letter, and it is true and correct in one leaf of ordinary blank paper, there being no sealed paper in these part, and that it may so appear, I sign it in this city of Santa Fe on the twelfth day of August, one thousand seven hundred and one.

In testimony whereof, I have affixed my customary signature.

JOSEPH RODRIGUEZ.

(Indorsed:) Royal sale of La Cienega in favor Miguel Garcia de las Rivas in the year 1701.

Mr. F. W. CLANCY: I desire to call a witness before I introduce this next paper.

ANDRES C. DE BACA sworn.

Direct examination by FRANK W. CLANCY.

Q. What is your name?

A. Andres C. de Baca.

Q. Where do you reside?

A. In the county of Santa Fe, New Mexico, Prec. No. 6.

43 Q. In what part of the county do you live?

A. Precinct No. 6.

Q. What is the name of that place? How is it usually known?

A. Known by the name of "Cienega."

Q. How long have you lived there, at Cienega?

A. Since 1881.

Q. Examine this paper and state whether you have ever seen it before?

A. Yes, sir; I have seen it.

Q. It is the same paper you and I were looking at together this morning?

A. Yes, sir.

Q. In whose possession was that paper?

A. This paper was in the possession of Nasario Gonzalez.

Q. Where did he live?

A. At Cienega, Santa Fe county.

Q. Is he now living?

A. He is dead.

Q. Do you know how long he lived at La Cienega

when he died.

Q. Was he, or not, the owner of land at that place?

A. He used to own most of the land there at "Cienega."

Mr. CLANCY: I desire to prove this paper came from the proper custody. That this deed was found among his papers.

Mr. REYNOLDS: I understand he says that it was obtained from Nasario Gonzales—or had been in his possession.

Mr. DAVIS: I object to the last question of Mr. Clancy, and move to strike out the answer of the witness as to whether or not Nasario

Gonzales was the owner of land in that vicinity as calling for the conclusion of this witness.

Objection sustained by the court, and answer stricken out.

Mr. CLANCY: I will put the question in another form.

Q. Was he or not to your knowledge in possession and claiming ownership of lands at La Cienega?

A. Yes, sir; he was.

Q. To any considerable extent or a small amount of land?

A. He owned most of the land there at Cienega.

Q. Did anything ever take place to specially call your attention to this paper which I have just shown you?

A. Yes, sir.

44 A. Some years ago they had a law suit in regard to that land and I made a copy of all these old papers, a copy and translation of all the old papers he had in his possession at that time.

Q. Was this or not one of those papers which you copied and translated?

A. Yes, sir; it was.

Q. State whether or not the land of which Nasario Gonzales was in possession was inside of the boundaries mentioned in that old paper?

A. Most of the land he owned was within the boundaries of the land mentioned in this paper.

Q. Are you personally acquainted with the objects mentioned in that deed as boundaries?

A. Yes, sir; I am.

Q. Can you state approximately about the time that you made the copy and translation of this deed?

A. I think during the year 1884 or 1885. I am not exactly certain. I don't remember exactly what year it was.

Mr. CLANCY: I now offer this old deed in evidence and file a typewritten copy and translation; the same was here marked Plaintiff's Exhibit C, and the translation read to court and jury as follows:

PLAINTIFF'S EXHIBIT C.

(Translation.)

At the Villa of Santa Fe on the twelfth day of March, one thousand seven hundred and four, before me Captain Juan Paez Hurtado, war lieutenant and captain-general of this Kingdom, acting as Juez Receptor with two attending witnesses, appeared Miguel Garcia de la Riba, resident of this city, and said that he was giving and gave in royal sale, the sitio of the old Pueblo of Zienega, in favor of his son, Juan Garcia de la Riba, for the price of one hundred dollars of the money of the country, that said Miguel Garcia de la Riba had by sale from Joseph Castellanos, and that its boundaries are on the north the water-shed of La Zieneguilla, on the east the Penasco Blanco (white rock) de las Golondrinas, on the south the canada of

Juana Lopez, on the west las boquillas, and renounces the laws of *non numerata pecunia* and those of the *dubus res de vendi* and *autentica pre fide jurobus* so that as his own property, the said grant of the old Pueblo of Zienega, he can exchange and
 45 transfer it or use the same at his own pleasure, and empowering the courts of His Majesty with all rigor of law to compel him to comply with the provisions contained in this document, and that if at any time he should bring suit, the said Mgl. Garcia de la Riba, he shall not be heard in court nor out of it, and as a guaranty he pledges his person and real and personal property he may now have or might have; and the said Miguel Garcia de la Riba further states that of the remainder he makes, grants, gives and donates pure and perfect which the law calls *intervivos*. To have and to hold he so executed and signed the same the said grantee Miguel Garcia de la Riba, together with myself and my assisting witnesses who were Mateo Truxillo and Jose Franco de la Barreda, both citizens (torn) of this city, and of (torn) the party I delivered this orig (torn) in the power of the purchaser (torn) on ordinary blank paper (torn) there being no sealed paper (torn) parts.

MGL. GARCIA DE LA RIBA.

Testigo de asistencia:

JOSEPH FRANCO DE LA BARREDA.

Ante mi como Juez Receptor.

JUN PAEZ HURTADO.

Testigo de asistencia.

MATEO TRUGILLO.

Mr. REYNOLDS: I object on the same ground as to the other documents and on the further grounds that the recitals in this paper does not locate the boundaries, nor does it have any reference to or locate the boundaries of the original grant. I suppose it is offered for the purpose of showing the location of one of the "calls" of the grant made in 1728.

Mr. CLANCY: To show the location of the lands of Juan Garcia de las Rivas.

Mr. REYNOLDS: I think it is as indefinite as the location of the original grant itself.

The COURT: I will allow it to go in evidence.

Objection overruled.

Exception reserved by defendant's counsel.

Mr. F. W. CLANCY to witness:

Q. Now, Mr. Baca, do you know where the water-shed or *caidos* of the Cienega is on the earth's surface?

A. Yes, sir.

Q. What relation to the house of Nasario Gonzales, in
 46 which direction—the house in which he formerly lived—in which direction is the water-shed?

A. North of the house of Nasario Gonzales.

Q. About how far would you say it was from the house to the water-shed?

A. To the divide.

Q. Yes, sir.

A. It must be about a mile and a quarter, more or less.

Q. Do you know where the Penasco Blanco de las Golondrinas is on the earth's surface?

A. Yes, sir.

Q. About how far is that from the house in which Nasario Gonzales formerly lived?

A. About one-half a mile.

Q. In what direction from the house?

A. North.

Q. Is it due north—or west or east of north?

A. A little west of north.

Q. Do you know where the Canada of Juana Lopez is?

A. Yes, sir; I do.

Q. Where is the Canada Juana Lopez?

A. It is south of Nasario Gonzales's house—a little west of south of Nasario Gonzales's house.

Q. In what direction does the Canada of Juana Lopez run?

A. At the beginning it runs west, and then it turns north.

Q. Do you know where the Old Delgado Ranch and what is called Pino's ranch, are?

A. Yes, sir; I do.

Q. How are they situated with reference to the Canada Juana Lopez?

A. The Delgado Ranch is east of the Canada de Juana Lopez and the Pino ranch.

Q. That valley called the Canada de Juana Lopez—I want to know where these places are with reference to that canada—are they in it or outside of it?

A. They are inside of the Canada.

Q. In that Canada is there any water or stream?

A. Yes, there are some springs there.

Q. Are you acquainted with what is called Las Boquillas?

A. Yes, sir.

Q. What are the Boquillas?

47 Q. They call the hills where the Santa Fe Creek or the Cienega Creek and the Juana Lopez Creek join, the Boquillas—there is a table land there to the north and land to the south.

Q. That is where the water of these streams enters the canyon?

A. Yes, sir.

Q. How long have you known these natural objects about which I have asked you by these names—Penasco Blanco, Canada de Juana Lopez and Las Boquillas?

A. I have known them since I was about 9 or 10 years old.

Q. And how old are you now?

A. I will be 56 years old the last day of November.

MR. REYNOLDS: I enter an objection and move to strike out the testimony of the witness, and enter the further objection to the in-

roduction of this deed on the ground that it raises a collateral issue in the case as to the location of this grant or location of the land described in the petition, and does not aid in locating the western boundary of the grant in question, and it is not the proper way or manner of locating the boundary of a grant or the boundary of a property.

Objection overruled by the court.

Exception reserved by defendant's counsel.

Cross-examination by M. G. REYNOLDS, attorney for defendant:

Q. You say you know where the Delgado Ranch is?

A. Yes, sir.

Q. How far south of Nasario Gonzales' house is it?

A. It must be from the house of Nasario Gonzales to the line of the Delgado Ranch, about a mile and a quarter, to the northern boundary of the Delgado Ranch.

Q. I am speaking now of the ranch house of the Delgado Ranch, and the corrals.

A. There are corrals there and a house, too.

Q. How far is Nasario Gonzales' house from those ranch houses?

A. About a mile and a half more or less.

Q. How was it—directly south?

A. South of the house of Gonzales.

Q. Almost directly.

A. Not exactly. The old Delgado house must be a little west of south from Don Nasario Gonzales' house.

Q. Do you know where the Juana Lopez Creek is?

A. Yes, sir.

48 Q. Is that what you call the Canada Juana de Lopez?

A. Well, the creek runs right inside the canada.

Q. How long is that Canada de Juana Lopez? The canada proper.

A. What I have known as the Canada Juana Lopez from the Delgado boundary down must be about a mile and three-quarters, more or less.

An adjournment was here taken until 2 p. m., Monday August 28th, 1905.

(Afternoon Session, Monday, Aug. 28, 1905.)

ANDRES C. DE BACA (recalled).

Direct examination by Mr. F. W. CLANCY:

Q. Have you seen this map before and had an opportunity to examine it (handing witness map).

A. Yes, I saw it before.

Q. From your knowledge of that part of the country, can you state whether or not that map shows with approximate accuracy the location of the Penasco Blanco, the house of Nasario Gonzales,

the Canada de Juana Lopez and the north boundary of the lands of the Cienega—the old road from Cerrillos to Pecos and the San Marcos road?

Mr. REYNOLDS: This is not a suit in the court of private land claims—but it is a suit in ejectment. The party must prove his property and title by evidence in proper form and the attempt to make that map an approximate map of the location of objects in that country in the manner in which it is done is improper and no foundation has been properly laid. The map should have been laid down to some scale and by some surveyor who could locate the lines accurately, because it might arise that the running of these lines might leave this property out and might not. The attempt to establish the lines and get the approximate location of these objects by testimony of that kind is incompetent.

Mr. CLANCY: If I should ask him to take a pencil and make a plat, he could do it. The weight and credibility of his evidence is entirely a different thing from the question of competency. If I have a plat already made, I can submit it to a man familiar with the country and ask him as to whether it is accurate or not, so far as he can say, and that is what I am attempting to do in this case.

The COURT: Answer the question Yes or No.

(Mr. CLANCY to witness:)

Q. Can you tell whether or not that is an accurate map
49 from your knowledge of the country?

A. From my knowledge of the land it seems to be a correct map of the place.

Q. Are you acquainted with the old road which runs from the Cerrillos to Pecos?

A. Yes, sir; I am.

Q. Are you acquainted with what is called the "San Marcos road"—the road from Santa Fe to the San Marcos Springs?

A. Yes, sir.

Q. Are these roads shown correctly on that map?

A. They seem to be correctly shown.

Cross-examination by Mr. REYNOLDS:

Q. What do you call the San Marcos road?

A. It is the road leading from Santa Fe through the Springs of San Marcos to go to Dolores and Golden.

Q. How long have you known that road?

A. Since 1869 I have known that road.

Q. Has it ever changed in the meantime?

A. Not to my knowledge.

Q. Substantially where it was in 1869?

A. I think it is about the same place where it was then.

Q. You don't know where it was before that time?

A. No, I do not know where it was before that time.

Q. That is what they call the San Marcos road now and in 1869?

A. They used to call it the San Marcos road at that time, and they call it so yet.

Q. Does it run right down by San Marcos?

A. It runs to the Spring of San Marcos. It don't run in a straight line from here to San Marcos, but it goes right by the spring.

Q. The spring is right in the San Marcos pueblo grant?

A. Yes, sir.

Q. How does the road run when it reaches the San Marcos spring?

A. Just before it gets to the spring it runs a little west of south.

Q. Do you know where the boundaries of the San Marcos pueblo grant are—in a general way?

A. Yes, sir; I know.

50 Q. How does the road run when it strikes the San Marcos Pueblo Grant?

A. When it strikes the northern boundary of the grant?

Q. Yes, sir; or whatever boundary it does strike, if it strikes it at all?

A. It runs almost due south.

Q. The San Marcos Pueblo Grant is nearly in the form of a square?

A. Yes, sir.

Q. How does it run when it passes the boundary line—does it come from the east or north up to it?

A. It comes from the northeast or a little to the east of north.

Q. About where does it make that turn, or does it make a turn?

A. I could not exactly tell about that.

Q. The road then runs in a southeasterly direction about three-fourths of the way, does it not?

A. It runs south after it leaves the town here for about eight miles. It runs almost south, and then it turns a little west of south.

Q. You have examined this map, have you?

A. Yes, sir.

Q. You say this map correctly locates the roads and places and you say the San Marcos road is substantially located on this map correctly?

A. To my knowledge it is.

Q. See if that is correct as to the San Marcos road on that map—See if it don't make a turn to the west in order to take it on that map what they call the "Cuesta del Oregano?"

A. (Looking at map.) Yes, sir.

Q. Then it starts directly south through Section 30, and it runs north and south through Section 30, does it not?

A. Yes, sir.

Q. Then down through Section 31, it curves a little to the west, and then passes out of that section?

A. Yes, that is the place I was talking about where it turns west of south.

Q. It is almost due west, is it not, as laid down on that map, and enters the lines of the Pueblo of San Marcos going nearly west

51 or a little south of west, and then takes to the southwest again as laid down on that map—is that correct?

Mr. CLANCY: The map shows for itself.

(No answer.)

Q. How long have you known the road from Pecos to Cerrillos?

A. I have known that road since 1866.

Q. What is the general direction of that road?

A. Well, when it comes out of Pino's ranch, it runs northeast for about three-quarters of a mile I think, and then it turns to the east until it gets to the Canada de los Alamos.

Q. What is the general direction of the road, east or west or north or south?

A. The general direction is east.

Q. Do you know what section Pino's ranch is in?

A. No, I do not. I know in which township it is in, but the section I do not know. It is in Township 15 north.

Q. Do you know the section—is it section No. 7?

A. I could not tell you.

Redirect examination by Mr. FRANK W. CLANCY:

Q. Do you know a spring called the Ojo del Coyote?

A. Yes, sir.

Q. Where is that situated with reference to the San Marcos grant?

A. I think it is north of the San Marcos grant.

Q. Examine this map and see whether that spring is correctly located on the map with reference to the San Marcos grant.

Objected to for same reasons interposed heretofore.

Overruled.

Exception reserved by defendant's counsel.

A. (Looking at map for some time.) Yes, I think it is correctly marked on this map.

Mr. CLANCY: I now offer in evidence the record of the marriage of Jose de Leyba, and a translation thereof, dated Aug. 1st, 1739, of which the copy and translation are presented as Plaintiff's Exhibit D, and reads as follows:

(Translation.)

On the 1st of Aug., seventeen thirty-nine, proceedings having been taken as the holy council of Joseph de Leyba Ma. Baca Trent requires and orders from which no impediments results, as
52 one resulted, I married and nuptially blessed in *facie ecclesie* Joseph de Leyba and Maria Francisca Rodriguez (or Baca), the witnesses to see them married being Juan Chrinos and Bartolome de la Cruz together with many others who were present, and this being the truth, I signed it said day, month and year.

FR. FRANCO. DE LA CONCEPON GONZALES.

Mr. F. W. CLANCY: At this time, I will file and read to the court and jury a stipulation.

In the District Court, San Miguel County.

MARIANO F. SENA, Plaintiff,

vs.

THE AMERICAN TURQUOISE COMPANY, Defendant.

Ejectment.

Stipulation.

It is hereby stipulated and agreed by and between the respective parties to the above entitled cause that any record, document or instrument in writing, a copy of which is contained in the printed record of the case of Mariano F. Sena, Appellant, vs. the United States, lately pending as No. 40, October Term, 1902, in the Supreme Court of the United States, or any petition, answer, order or decree therein contained which may be a part of the proceedings of the court of private land claims, may be offered in evidence on the trial of said cause, subject to all legal objections that might be made to the original (of which it is a copy) were said original itself offered as evidence; and in case the copy of such document or instrument so contained in the said printed record does not have the certificate of the custodian attached thereto, the party offering said copy shall at the time state and make a part of the offer of record the name of the person or official in whose custody the said original is to be found. It being the intention and object of this stipulation to avoid the expense and delay in procuring the attendance as witnesses the custodian of such records, documents or instruments, or the delay and expense of procuring the custodian to certify to the correctness of the copy, the original of which is to be found in his office or possession, or to avoid inconvenience of procuring properly certified copies of the pleadings, orders, and decrees of the court of private land claims, or the Supreme Court of the United States.

It is further stipulated that copies of any other records, documents, or instruments, duly certified by their lawful custodian, and not included in the printed record above referred to, may be offered on the trial of this cause with the same effect as the original, subject to all legal objections thereto, except as to their not being original; and this is to include any documents or instruments in the record of Santa Fe county, and certificates of the officers of the United States land office and the certificates of the payment of taxes and entries in church records.

H. S. CLANCY,
F. W. CLANCY,

Attorneys for Plaintiff.

EDWARD L. BARTLETT,
MATT G. REYNOLDS,

Attorneys for Defendant.

May 20, 1904.

Mr. F. W. CLANCY: I next offer in evidence the Will of Simon de Leyba, of which we present a copy and translation marked plaintiff's Exhibit E.

This will came from the Spanish and American archives which were in the custody of the Librarian of the Territory of New Mexico.

The COURT: This was before the annexation.

Mr. CLANCY: Yes, sir.

Mr. DAVIS: We desire to object to the introduction of the will. The obvious purposes of the introduction of this document are two: First, to prove the man who made the will is or was the son of Jose de Leyba, (secondly) to prove that he was the father of Salvador Leyba; that is, it is an attempt to prove the pedigree and relationship of these two persons by the declaration of this man Simon de Leyba, which in this case happens to be a declaration in writing; it is apparent that the admission of this instrument would be a breach of the laws against hearsay testimony; that is to say, by this method they are making Simon de Leyba testify in this court who was his father and who was his son. It is a well recognized rule of law that declarations of deceased persons may be introduced in court for that purpose—namely—for the purpose of proving pedigree, but there is a qualification of that rule, namely—that before the declaration of any person may be introduced for that purpose it must be shown by intrinsic evidence—by evidence
54 apart from his own declaration, that he is related to the persons about whom he pretends to testify, that is, the mere declaration of Simon de Leyba—his own statement, * * * is not sufficient under the rules as laid down by the various decisions to prove that he was the son of Juan Leyba, or the father of Salvador Leyba.

The COURT: As I understand it, Mr. Sena bought this property only a few years ago. I do not see why this Leyba cannot be brought in.

Mr. CLANCY: Unfortunately the members of the family are dead. I can prove declarations of Salvador Leyba as to his family. The witnesses by whom I want ot prove that are not here now.

The COURT: I think you better do that. I will allow this will in evidence, subject to that proof.

Mr. DAVIS: I desire to make a further objection of the will. The rule is that an ancient document proves itself. I understand that rule to be dependent that the instrument must come from the proper custody. It is not possible to introduce in court an instrument which purports to be one hundred years old and have it prove itself. It must be proven that it comes from the proper custody. I understand this will was found in the Spanish archives.

Mr. REYNOLDS: The original was originally in the office of the territorial librarian, and was discovered by Mr. Clancy there, and the certificate to the instrument that was filed is the certificate of the territorial librarian, and therefore I assume it was a part of the archives in the possession of the librarian of the territory.

Mr. CLANCY: I did not suppose there would be any objection like

that. They were a part of the original archives turned over and assumed by the American government when we took charge of it.

Mr. REYNOLDS: The question is whether it is in proper custody so its authenticity and verity can be made. I have no doubt your copy is a true copy. I have no doubt the original was in his possession at the time he made the certificate. The question arises, is the officer who was the custodian of it, and certified to it, is and was he the lawful custodian at the time, so the verity proves itself on account of it being an ancient document.

Mr. CLANCY: I think there is a statute of the territory on that subject.

The COURT: You may look it up and submit it later.

55 The will was here read to the court and jury and marked Plaintiff's Exhibit E, and is as follows:

(Translation.)

In the name of Almighty God, the Father, Amen. All who may see this writing of my testament that I, Zimeon de Leiba, finding myself in my sound and entire judgment, memory, as testament and will, I have believed as I firmly believe in the Mystery of the Most Holy Trinity, God the Father, God the Son, God the Holy Ghost, and one single, true God, and in all the other things which Our most Holy Roman Apostolic Catholic Church believes and ordains, which faith and belief I have lived and declare that I will live and die, and finding myself at my ranch, far from my house, and having received a mortal blow from an unbroken mule and believing myself unable to live nor my body to be moved, I command and order, before dying, my last will of my testament be made that all may see it, in the following form, to-wit:

Firstly. I send my body to the earth of which it was formed, and my soul I commend to God, Our Father; that my body be buried at the Chapel of San Miguel in Santa Fe, near my residence, and being at a proper hour, let it be with a mass of bodily presence.

Item. I declare and direct that there be paid nine days' of masses for the repose of my soul in the parish church of Our Father, Saint Francis, by the Reverend Father Hozio.

Item. I declare firstly that I have been married and nuptially blessed according to the rules of our Holy Mother Church with Feliciano Gonzales, already deceased some years, in which marriage we procreated one son, Salvador Antonio, whom I recognize as my sole heir.

Item. I declare as my property, the house of my residence at Analco which is composed of six rooms, a corral and stable, an interior court (placita) and a garden.

Item. I declare that I owe nothing to any one.

Item. I declare that Francisco Anzuras owes me seventeen dollars of the country, which I direct shall be collected.

Item. I declare that Francisco Coriz, a native of the Pueblo of Santo Domingo, owes me fifteen she goats and ten breeding ewes, which I direct shall be collected.

Item. I declare for my country property, that I have twenty-seven breeding cows and four yoke of oxen, five range bulls, ten yearling heifers and five over a year old.

56 Item. I declare that I have thirty-two she goats without the little ones.

Item. I declare that I have a small herd of mares, two broken horses, one unbroken mule, five asses, two unbroken and three broken, which are in the possession of Antonio Riega at the Arroyo de Piedra.

Item. I declare that I have two sculptured saints and one Holy Christ of bronze, one large carpet of twenty-six Castilian varas, one canopy, two bedsteads, one large copper kettle, one small copper kettle, and one small kitchen tripod.

Item. I declare that I have here one complete corn-crib.

Item. I declare that I have one piece (suerte) of wheat-growing land adjoining the Tenorios.

Item. I declare that I have in my possession the sabre of my deceased father, which I direct shall be delivered to my son Salvador.

Item. I declare that I have an old trunk of raw-hide in the house of my residence at Santa Fe.

Item. I declare that I have a pistol, a cartridge-box, and a Spanish gun.

Item. I declare that I have a grant of lands given by the King of Spain to my deceased father Joseph de Leiba in 1728, nad their boundaries are as follows:

On the south the slope (cuesta) called the arroyo of the oregano, on the north, the road which goes towards Pecos from the Cerrillos, or lands of the Captain Sebastian de Vargas, on the east with the road which goes from Santa Fe to the spring of San Marcos, on the west with lands of the old Pueblo of the Cienega, as appears by the original papers which are to be found in the trunk of my residence at Santa Fe. In said grant there is constructed a ranch at the Coyote Spring, a small house, two rooms and a small kitchen, a little tower, a large corral of poles, two corrals for young animals, a corn-crib not very large with corn and beans, a hut (jacal) in the temporal lands. There is at my ranch my farming tools, six plows, two axes, two hoes, six yokes, three ox-goads, one loom, one spinning wheel, three skeins (of silk?) two wool-cards, one adze, four pairs of yoke straps, four plow-beam straps, one riding saddle complete. As. S.

And in order to complete this my testament and last will I order appoint for my executor my son Salvador Antonio, and for
57 its better validation and stability, I sent to supplicate and ask the Alferez Salvador Rivera that he should come here to my ranch, I not being able to move myself on account of my being accidentally wounded (or hurt), that he should interpose his authority, and said Alferez I said that *that* I was executing and executed it, and I interposed my judicial authority and decree. I, said Alferez Salvador Rivera, who am present at its execution, as far as I may be able and there is authority in law, and I certify and know that the testator is at the present moment in danger but in his sound

and entire judgment according to the concurrence of reasons, that thus he executed it at this place of the Coyote Springs on the fifteenth day of the month of October in this year 1783, and this took place before me the Alferez Rivera at request were called and asked, being witnesses to the making of this testament Francisco Antonio Zuaso, Antonio Riega and Jose Miguel Bachiha.

ZIMEON DE LEYBA. (Rubric)

SALBADOR RIVERA. (Rubric)

Witnesses:

FRANCO. ATO. ZUASO. (Rubric)

ANTO. RIEGA. (Rubric)

Witness:

JOSEPH MIGL BACHICHA. (Rubric)

Mr. CLANCY: I now offer in evidence the church record of the baptism of Salvador Antonio Leyba, which shows that he was baptized February 14th, 1770, as the legitimate son of Simon de Leyba and Feliciana Gonzales, of which we present a copy and translation.

The same was marked Plaintiff's Exhibit F, and read to the court and jury, and is as follows:

(Translation.)

On the fourteenth day of the month of February, one thousand seven hundred and seventy, I solemnly baptized and anointed with the sacred oils, Salvador Antonio, legitimate son of Simon de Leyba and Feliciana Gonzales, whose sponsors were Miguel Quintana and Juana Barbara Quintana, and that so it may appear, I sign it the said day, month and year.

FR. JOSEPH DE URQUIDO.

Mr. CLANCY: I now offer in evidence the deed of Salvador Antonio Leyba to Juan Angel Leyba, which recites the latter is a son of the first, conveying the grant in question, a copy and translation of which is presented and marked Plaintiff's Exhibit G.

Mr. DAVIS: We desire to make a formal objection to this deed, that there is no proof of the execution of it, and especially no proof of the official character of Juan Gallego, who is recited as being the constitutional alcade. My objection is there is no proof that Juan Gallego, who signed the deed, was what he purports to be, the constitutional alcade.

Objection overruled by the court.

Exception reserved by defendant's counsel.

Plaintiff's Exhibit G was here read to the court and jury as follows:

(Translation.)

[Seal Mexican Republic.]

Third seal, two reals, for the years of one thousand eight hundred and twenty-six and eight hundred and twenty-seven.

(Seals on the margin:)

(Seal, validated for the years 1828 and 1829.)

(Seal, validated for the years 1830 and 1831.)

(Seal, validated for the years 1832 and 1833.)

(Seal, validated for the years 1834 and 1835.)

In the city of Santa Fe and capital of New Mexico on the ninth day of the month of August, one thousand eight hundred and thirty-four, before me the citizen Juan Gallego, constitutional alcalde of first appointment in said city and its jurisdiction, appeared present in their own proper persons the citizens Salvador Antonio Leyva and his son Juan Angel Leyva, residents of the said city whom I certify that I know, and the first said that he was giving, aliening, selling and conveying and in effect did sell, give and alien and convey to his son Juan Angel Leyva, all my right which comes to me by inheritance and law in the rancho of the Coyote Spring with its houses and corral together with the grant in which the said ranch is situated which was given to my grandfather by the King of Spain the twenty-fifth day of May, one thousand seven hundred and twenty-eight.

And its boundaries are as follows to-wit on the north by lands of the Captain Sebastian de Vargas, on the east by the road which goes from the said city of Santa Fe to the spring of San Marcos, and on the west by lands of the old Pueblo of the Cienega, and on the south by the hill (cuesta) called the Arroyo of the Oregano.

59 Which I, the said Salvador Leyva, declared to have sold conveyed and given and aliened for the price and quantity of two hundred and twenty-four dollars of the country which he confesses to have received to his satisfaction and content and that if it be or may be worth more, he makes to him of the excess pure absolute perfect irrevocable gift and donation which the law calls *inter vivos*, and that he conveys aliens in favor of the said Juan Angel Leyba all the right and dominion which the said grant has and in order that he may enjoy it as he may wish, selling it, aliening it without any impediment interposed by him his heirs and executors successors and if by chance they should interpose it they shall not be heard neither in court nor out of it binding himself in that case to come to the defense until he be left in quiet and peaceful possession for whose indemnification and fulfilment of this deed he binds his person and property present and future all subject to the laws of the matter.

All of which he executed before me the constitutional alcalde aforesaid and before those of my attendance with whom I act and certify as delegate judge asking me I should interpose my judicial authority and power and I said alcalde declared that I was interposing and did interpose it as far as by law is conferred upon me in testimony of

which he signed with me and those of my attendance to which I certify.

SALVADOR ANTONIO LEYVA. X

Witness:

PEDRO LOVATO.

JUAN GALLEGO.

Witness:

MGL. ANTO. RUBIO.

Attending:

TSQUIPULA PAHECO.

Attending:

JUAN GARCIA.

Mr. F. W. CLANCY: I now offer in evidence the will of Salvador Antonio Leyba, as it appears of record in the records of the probate court of Santa Fe county, and present a copy and translation which will be marked Plaintiff's Exhibit H.

Mr. DAVIS: We make the same objection to this document that was made to the introduction of the other will, namely, that the declaration of Salvador Leyba to the effect that he was the father of Juan Angel Leyba is not admissible, without other proof of his relationship to the family.

The COURT: I will admit it subject to further proof on that point.

Mr. DAVIS: We object further on the ground that the will has never been probated.

Objection overruled.

Exception reserved by defendant's counsel.

The translation of the will was here read to the court and jury and marked Plaintiff's Exhibit H.

[This exhibit appears later, when the original of the will is offered.]

THOMAS GWYN sworn.

Direct examination by Mr. FRANK CLANCY:

Q. What is your name?

A. Thomas Gwyn.

Q. Where do you reside?

A. In Santa Fe.

Q. What is your occupation?

A. Surveyor.

Q. How long have you lived in Santa Fe?

A. For the last twenty years or more.

Q. Are you familiar with the country west and southwest and south of Santa Fe, for a distance of 12 or 20 miles?

A. Yes, sir.

Q. Have you seen this map before?

A. Yes, sir.

Q. From your examination of the map and your knowledge of

the country can you state whether or not that map shows with substantial accuracy the location of natural objects and roads that are named thereon, and also the house of Nasario Gonzales?

A. Yes, sir.

Q. Does it show those things with accuracy or not?

A. Why to the best of my belief it does.

Q. Have you such knowledge of the country that you can express a positive opinion about it?

A. Well, I have passed over those roads a great deal in the last 20 years, and been all over that country.

Q. Well, from your knowledge, can you say whether or not that map as to those matters is substantially correct?

A. I believe to be so.

61 Q. Can you say positively whether it is or not?

A. Well, sir, approximately, it is.

Cross-examination by Mr. REYNOLDS:

Q. Do you know the location of the Cerrillos tract?

A. Yes, sir.

Q. What is its location?

A. It runs across there from Bonanza from the northwest to the southeast.

Q. Do you know anything about the section lines down there?

A. I have been on them. I know something about them.

Q. When was the first time you were down there?

A. I was down there in 1879.

Q. The first time you were there in 1879?

A. 1879 or 1880, during the mining excitement.

Q. Do you know where Pino's ranch is?

A. Yes, I have been there, but I don't remember the section.

Q. How is it situated with reference to the Cerrillos tract?

A. Pino's ranch is right below the Delgado ranch in a westerly direction.

Q. How about the Sitio de Juana Lopez?

A. That is west of the Cerrillos tract.

Q. Does it adjoin the Cerrillos tract?

A. I believe it does.

Q. What about the Sitio de los Cerrillos?

A. That is on the east.

Q. East of what?

A. I am more familiar with the Cerrillos tract than I am with the others. I know the other two are west of that.

Q. What direction is Nasario Gonzales' house from Pinos' ranch?

A. It seems to me that Gonzales' ranch is northeast from it.

Q. Northeasterly from Pinos' ranch * * * Do you know where the road from Pecos to Cerrillos is located?

A. Yes, sir.

Q. What is its direction?

A. From Pino's ranch it runs in a northeasterly direction.

Q. How close to Gonzales' house does it run?

A. I cannot say very well without looking at the map.

(Here follows maps marked pp. 62 & 63.)